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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 761

WILLIAM MAHONEY, AS LIQUOR CONTROL COMMISSIONER OF THE STATE OF MINNESOTA, ET AL., APPELLANTS,

vs.

JOSEPH TRINER CORPORATION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

FILED FEBRUARY 7, 1938.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 5, 1938.

—4385

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JOSEPH TRINER CORPORATION, a Corporation, Plaintiff,

vs.

DAVID R. ARUNDEL, as Liquor Control Commissioner of the State of Minnesota, Harry Peterson, Attorney General of the State of Minnesota, and Floyd B. Olson, Governor of the State of Minnesota, Defendants

BILL OF COMPLAINT—Filed May 25, 1935

The plaintiff above named for his bill of complaint herein alleges:

I

That said plaintiff is now and during all the times hereinafter mentioned was a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois; that said plaintiff's true and correct name is Joseph Triner Corporation; that said plaintiff was originally incorporated under the laws of the State of Illinois on the 8th day of December, 1917, as Joseph Triner Company; that thereafter and on the 16th day of April, 1934, said plaintiff's corporate name was changed to Joseph Triner Corporation;

That said plaintiff is a citizen and resident of the State of Illinois, and that its home office and place of business is at number 1333 to 1339, inclusive, South Ashland Avenue in the City of Chicago, Illinois.

II

That said plaintiff is now and during all the times hereinafter mentioned was, under and by virtue of the terms and provisions of its charter, engaged in the business of manu-
[fol. 2] facturing intoxicating liquors for sale, and in selling intoxicating liquors as a wholesaler to retail dealers in intoxicating liquors; that said plaintiff's manufacturing plant is situated at the address above named in the City of Chicago, Illinois.

III

That on the 19th day of February, 1934, said plaintiff did in all things comply with the statutes of the State of Minnesota governing and effecting foreign corporations, and was on said date duly licensed by the State of Minnesota to engage in business in said State as a foreign corporation;

That on the 16th day of April, 1934, the corporate name of said plaintiff was changed in the office of the Secretary of State of Minnesota; that said plaintiff is now a duly licensed foreign corporation with full right and authority to engage in business in the State of Minnesota;

That upon being duly licensed to do business in the State of Minnesota, said plaintiff did on or about February 19, 1934, establish an office, warehouse and place of business in the City of Saint Paul, Ramsey County, Minnesota, and within the jurisdiction of the above entitled court which said office and place of business has been ever since said date, and is now being conducted, operated and maintained by said plaintiff;

That the business of said plaintiff as operated, conducted and maintained in the State of Minnesota is that of a wholesaler engaged in the business of selling intoxicating liquors to retailers;

That said plaintiff during the times herein mentioned has carried a stock of merchandise at its place of business in Saint Paul, Minnesota, of the approximate worth and value of $20,000.00.

[fol. 3]

That on or about the 5th day of December, 1933, said plaintiff was given and granted a license and permit by the Federal Alcohol Control Administration of the Government of the United States to manufacture intoxicating liquors and to sell the same at wholesale which said Federal license and permit said plaintiff now holds and the same is in full force and effect;

That on the 19th day of February, 1934, said plaintiff, under its original name of Joseph Triner Company, was issued a state license and permit to manufacture intoxicating liquors and to sell the same in the State of Minnesota as a wholesaler; that said state license and permit was reissued to said plaintiff under its new corporate name on

April 16, 1934; that said state license and permit were issued to said plaintiff by the defendant, David R. Arundel as Liquor Control Commissioner of the State of Minnesota as he was authorized to do by the laws of said State; that said state license and permit is now and during all the times herein mentioned has been in full force and effect.

V

That said defendant, David R. Arundel, is now and during all the times herein mentioned was the duly appointed, qualified and acting Liquor Control Commissioner of the State of Minnesota with full power and authority appertaining to that office under and by virtue of the laws of said state; that he is a citizen of Minnesota and a resident of Minneapolis, Hennepin County, Minnesota; that said defendant, Harry Peterson, is now and during all the times herein mentioned was the duly elected, qualified and acting Attorney General of the State of Minnesota and is a citizen of said state residing in St. Paul, Minnesota; that said defendant, Floyd B. Olson, is now and during all the times herein mentioned was the duly elected, qualified and acting Governor of the State of Minnesota, that he is a citizen of said state residing in Minneapolis, Hennepin County, Minnesota.

[fol. 4]

VI

That for the purpose of complying with the laws of the State of Minnesota and the rules and regulations of said defendant, David R. Arundel as Liquor Control Commissioner of said State, the plaintiff herein did prior hereto register and file with said Liquor Control Commissioner the various brands of liquor which said plaintiff proposed and intended to sell at wholesale in the State of Minnesota, and which said plaintiff, as manufacturer, intended to import into the State of Minnesota for the purpose of sale; that Exhibit "A" hereto attached truly and correctly shows the names of said brands of liquor and the dates when the same were filed and registered with the said Liquor Control Commissioner; that said Exhibit "A" is hereby made a part hereof by reference; that at the time of filing and registering said brands with the Liquor Control Commissioner of Minnesota said plaintiff furnished to said Commissioner and filed with said brands, a chemical analysis of each of said brands of liquor, which chemical analysis was accepted

and approved by said Liquor Control Commissioner and said plaintiff was granted full right, permission and authority to import said brands of liquor into the State of Minnesota and to sell the same at wholesale in said State of Minnesota;

That each and all of said brands of liquor were manufactured by said plaintiff at its manufacturing plant and place of business in the City of Chicago, Illinois;

That since February 19, 1934, said plaintiff has shipped in interstate commerce from the City of Chicago, Illinois to its warehouse and place of business in the City of Saint Paul, Minnesota, intoxicating liquors manufactured by it aggregating in amount the sum of approximately $90,000.00; that said liquor so shipped into Minnesota included all of the brands listed upon Exhibit "A" hereto attached; that [fol. 5] when said liquor was received in the State of Minnesota and placed in the warehouse, the same was resold by said plaintiff in the State of Minnesota to more than 250 retail dealers in intoxicating liquors in the State of Minnesota who in turn sold the same to consumers in said state; that all of said liquor shipped by the plaintiff into the State of Minnesota as hereinbefore alleged moved into channels of interstate commerce;

That said plaintiff for the purpose of establishing and building up its business in the State of Minnesota has spent approximately $10,000.00 in advertising and sales promotion work; that said plaintiff has built up and established an extensive demand for each and all of said brands of liquor listed on Exhibit "A", has developed an extensive and valuable goodwill in and to each of said brands; that said plaintiff has popularized said brands of liquor with the consuming public; that said plaintiff has since it was licensed to do business in the State of Minnesota realized a net profit from the business carried on by it in the State of Minnesota of approximately $1200.00 per month; that said business has been progressively increasing from month to month.

VII

That the Legislature of the State of Minnesota at its regular session in 1935 enacted chapter 390 of the Session Laws of 1935 which reads as follows:

"An Act to Regulate the Importation of Intoxicating Liquor Containing More Than 25 Per Cent of Alcohol by Volume

Be it enacted by the Legislature of the State of Minnesota:

Section 1. No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

[fol. 6] that said law was duly approved on the 29th day of April, 1935 and is now a part of the statutory law of the State of Minnesota; that after the enactment of said law said defendant, David R. Arundel as Liquor Control Commissioner of the State of Minnesota, notified said plaintiff that said law had been enacted and that said plaintiff should cease and desist as a manufacturer and wholesaler from importing any brand or brands of intoxicating liquors containing more than 25% of alcohol by volume ready for sale without further processing unless such brand or brands were duly registered in the patent office of the United States.

VIII

That none of said brands listed on Exhibit "A" have ever been registered in the patent office of the United States and that each and all of said brands contain more than 25% of alcohol by volume, and that each and all of said brands so imported by the plaintiff in the State of Minnesota are finished products and no further processing is necessary;

That since the enactment of said law by the Legislature of Minnesota said plaintiff has been prevented by the defendant, David R. Arundel as Liquor Control Commissioner of the State of Minnesota from importing any of said brands in the State of Minnesota as a manufacturer and from selling any of said brands in the State of Minnesota as a wholesaler;

That at the time said law was enacted the plaintiff herein had a stock of merchandise consisting of said brands listed on Exhibit "A" in the State of Minnesota amounting to approximately $20,000.00 which stock of merchandise said

plaintiff has been permitted to sell and deliver to its customers in the State of Minnesota; that said stock has been exhausted; that said defendant has unfilled orders on hand for brands of liquor listed on Exhibit "A" amounting to approximately $1,000.00 and has been forced to reject orders in the amount of approximately $5,000.00 for brands of liquor listed on Exhibit "A" for the reason that said [fol. 7] plaintiff has been unable to accept said orders and to fill the same for the reasons hereinbefore set forth and alleged; that because of said law and the attempt to enforce the same by the Liquor Control Commissioner, said plaintiff has been obliged to lay off his traveling salesmen, desist in advertising said brands of liquor and in promoting its business in the State of Minnesota.

IX

That on account of said law and the acts and conduct of said Liquor Control Commissioner thereunder as hereinbefore alleged, the said plaintiff's business has been practically closed in the State of Minnesota; that the property and business of said plaintiff in the State of Minnesota, including said plaintiff's goodwill and said brands listed on Exhibit "A", is of the worth and value of $30,000.00; that unless said plaintiff is permitted to import said brands of liquor in the State of Minnesota and to sell the same at wholesale in the future as it has been privileged and permitted to do in the past, the business of said plaintiff will be completely and totally destroyed and said brands for use in the State of Minnesota will be rendered of no value in said state and said plaintiff will be deprived not only of said property and business of the value of $20,000.00, but will be deprived of future profits which said plaintiff believes will amount during the year 1935 to at least the sum of $10,000.00;

That in addition to selling at wholesale the brands of liquor listed upon Exhibit "A" which are brands owned by said plaintiff, said plaintiff has imported into the State of Minnesota through the channels of interstate commerce brands of liquor manufactured by other manufacturing concerns which brands were duly registered with the said Liquor Control Commissioner and permits issued for the sale thereof; that said brands of liquor when so imported by said plaintiff were sold by it as a wholesaler in the State

of Minnesota with the approval of the said Liquor Control [fol. 8] Commissioner and in conformity with law; that since the enactment of said statute as hereinbefore alleged, said plaintiff has been deprived of the right and privilege to import said brands and to sell the same as a wholesaler in the State of Minnesota;

That since April 29, 1935 there have been and are now citizens and residents of the State of Minnesota engaged in the business of importing brands of intoxicating liquor into the State of Minnesota containing more than 25% of alcohol by volume for the purpose of further processing the same in the State of Minnesota which said brands are not now and never have been registered in the patent office of the United States; that said liquor so imported is being processed in Minnesota and sold at wholesale in Minnesota and in other states in interstate commerce without said brands being registered in the patent office of the United States; that under said statutory law hereinbefore set forth, it is unnecessary for said brands to be registered in the patent office; that there are a large number of manufacturers and wholesalers of intoxicating liquors who, under the provisions of said statute and with the permission of the said Liquor Control Commissioner, are engaged in importing from other states through the channels of interstate commerce into the State of Minnesota intoxicating liquors containing more than 25% of alcohol by volume under trade marks which have been registered in the patent office of the United States; that the liquor manufactured by plaintiff and sold by him under the brands listed on Exhibit "A" are identical in kind, ingredients and quality with liquors being sold in Minnesota by manufacturers and jobbers in Minnesota under brands registered in the patent office of the United States; that the registration of brands in the patent office of the United States is not in any way dependent upon the kind, ingredients or quality of the liquor to which the brand is affixed;

That at least six (6) months will be required from and after the date hereof to register each of said brands listed on Exhibit "A" in the patent office of the United States; that to register said brands the plaintiff would be required to lay out and expend approximately the sum of $1600.00; that should oppositions to any of said registrations be filed,

a greater period thar six (6) months would be required to obtain said registrations and the cost of said registrations [fol. 9] would be materially and substantially increased over and above said figure of $1600.00; that while the brands of said plaintiff listed on Exhibit "A" have been duly approved by said Liquor Control Commissioner of Minnesota and sold in the State of Minnesota and while said plaintiff has acquired valuable property rights therein, that because of the nature and character of said brands, there is a reasonable probability that some of the same cannot be registered in the patent office of the United States;

That under the laws of the United States and the rules and regulations of the United States government adopted thereunder, said plaintiff having obtained a Federal license and permit to manufacture liquors in the City of Chicago, Illinois cannot obtain a license and permit to manufacture and process intoxicating liquors in the State of Minnesota without abandoning and discontinuing said manufacturing business in the State of Illinois; that in addition to shipping its manufactured product into the State of Minnesota as hereinbefore alleged, said plaintiff has been and now is engaged in shipping said brands of liquor listed on Exhibit "A" in interstate commerce in various states of the United States; that said plaintiff has extensively advertised said brands throughout the United States and spent large sums of money in and about the creation of a demand for said brands of liquor;

That the driving of said plaintiff from the State of Minnesota by said statutory law hereinbefore set forth has substantially and materially affected said plaintiff's business in interstate commerce in other parts of the United States;

That said plaintiff employes in its manufacturing plant in the City of Chicago, Illinois 120 employees who are engaged in and about the manufacture of intoxicating liquors; that more than 200 manufacturers and wholesalers of intoxicating liquors have been duly licensed to sell their various brands in the State of Minnesota which brands have [fol. 10] not been registered in the patent office of the United States; that each of said manufacturers and importers is directly affected by said statutory law.

X

That said statutory law hereinbefore set forth is void for the reason that the same violates the Constitution of the United States in that:

a. It is unreasonable, arbitrary, oppressive and discriminatory.

b. It denies to the plaintiff and others similarly situated the equal protection of the law.

c. It denies to the plaintiff the right to carry on a lawful business recognized and made lawful by the State of Minnesota, in a lawful manner.

d. It takes and destroys property and property rights of the plaintiff without just cause or reason and without just compensation.

e. It unreasonably and arbitrarily infringes upon the freedom of contract.

f. It effectively confiscates the property of the plaintiff without just compensation.

g. It is by its provisions in restraint of trade prohibitory of lawful acts done in the conduct of a lawful business.

h. It is class legislation enacted for the benefit of the manufacturers and wholesalers who own or control brands registered in the United States patent office at Washington, and for the benefit of manufacturers and wholesalers engaged in the business of manufacturing and processing liquor in the State of Minnesota who import liquor into said state for further processing.

i. It is arbitrary, discriminatory and unreasonable interference with interstate commerce.

j. It has no relation to the public health, morals or welfare of the people of the State of Minnesota, and is enacted for the avowed purpose of discriminating against manufacturers and laborers engaged in processing liquor outside of the State of Minnesota and in favor of manufacturers, laborers and citizens engaged in the processing and manufacturing of liquor within the State of Minnesota.

[fol. 11] k. It denies said plaintiff and other manufacturers and wholesalers similarly situated with the equal protection of the law.

XI

That this action is brought by said plaintiff on its own behalf and on behalf of all other manufacturers and whole-

salers of intoxicating liquors similarly situated and who are affected by the provisions of said statutory law hereinbefore set forth; that the question of the constitutionality of said statute is one of common and general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court.

XII

That said plaintiff has no plain, speedy and adequate remedy at law; that unless equitable relief by temporary and permanent injunction is granted by this court, the business of said plaintiff and that of all other manufacturers and wholesalers similarly situated and the property of said plaintiff and said manufacturers and wholesalers and their businesses will be destroyed before the validity of said statute can be determined in any other manner; that unless temporary and permanent injunction is granted by this court to the said plaintiff and said manufacturers and wholesalers, great and irreparable loss and damage will result to said plaintiff and said manufacturers and wholesalers; that unless said defendant, as Liquor Control Commissioner, be restrained and enjoined, a multiplicity of suits will result.

XIII

That the jurisdiction of this court depends on the following grounds:

a. This is a suit of a civil nature in equity arising under the Constitution of the United States to enjoin the enforcement of the Statute hereinbefore set forth of the State of Minnesota on the ground that said statute violates the Federal Constitution and the rights of the plaintiff thereunder, and that the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

[fol. 12] b. This is a suit of a civil nature in equity between citizens of different states wherein the amount in controversy exceeds, exclusive of interest or costs, the sum or value of $3,000.00.

-IV

That said defendant, Harry Peterson, as Attorney General of the State of Minnesota, and said defendant, Floyd

B. Olson, as Governor of the State of Minnesota are made defendants herein for the reason that it is the purpose and intention of said plaintiff to make application to the court for a temporary injunction herein under and pursuant to the terms and provisions of Section 266 of the Judicial Code of the United States, also known as Title 28, Section 380 of the United States Code Annotated.

Wherefore, Plaintiff prays:

1. That the court adjudge and determine Chapter 390 of the Session Laws of the State of Minnesota for 1935 to be in violation of the Constitution of the United States and in all things illegal and void.

2. That a temporary injunction be issued by the court restraining and enjoining said defendant, David R. Arundel, as Liquor Control Commissioner of the State of Minnesota from enforcing said statute and from any way interferring with said plaintiff in importing and selling the brands of liquor listed upon Exhibit "A" under the license and permit heretofore granted it by the said Liquor Control Commissioner.

3. That said plaintiff be given and awarded a permanent injunction restraining and enjoining said defendant, David R. Arundel, as Liquor Control Commissioner of the State of Minnesota from enforcing said statute and from any way interferring with said plaintiff in importing and selling the brands of liquor listed upon Exhibit "A" under the license and permit heretofore granted it by the said Liquor Control Commissioner.

[fol. 13] 4. That said plaintiff be given and awarded such other further and different relief as it may show itself entitled to in the premises.

Joseph Triner Corporation, by Joseph Triner, President. Bradford, Cummins & Cummins, Carl W. Cummins, Attorneys and solicitors for plaintiff, 330 Minnesota Building, St. Paul, Minnesota.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

List of brands of the plaintiff and the dates of the filing and registration of the same with the Liquor Control Commissioner of the State of Minnesota.

July 16, 1934—Furlong, Field, Anisette, Cordial Q. R., Creme de Menthe, Curacao, Kuemmel, Spearment, Apricot, Blackberry, Maraschino, Peach, Cordial C. G., Cordial C. Y., Cordial B, Creme de Cacao, Vermuth, Orange Bitters, Club Bitters, Elixir D'Assine, Sloe Gin.

Aug. 3, 1934—Triner's Red Seal Gin.

Aug. 3, 1934—Top Sergeant.

Aug. 16, 1934—Distilled Gin, Stearns County, Captain Joe.

Sept. 13, 1934—Top Sergeant.

Sept. 20, 1934—Triner's Brandy.

Oct. 4, 1934—Heathery Isle, Harvey Mac Naire.

Nov. 5, 1934—Barr Whiskey.

Feb. 20, 1935—Bill Taylor.

Mar. 18, 1935—Southern Hospitality.

Apr. 2, 1935—Bartenders Choice.

May 4, 1935—Ceska.

May 4, 1935—Polska.

May 6, 1935—Jules Boni Distilled Dry Gin.

May 6, 1935—Red Seal Distilled Gin.

[fol. 15] *Duly sworn to by Joseph Triner. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed August 16, 1935

Now comes the defendants and for their joint and several answer to plaintiff's bill of complaint herein respectfully state and inform the court:

I

Defendants admit the allegations set forth in paragraph I of plaintiff's complaint.

II

Defendants admit the allegations set forth in paragraph II of plaintiff's complaint.

III

Defendants admit the allegations set forth in paragraph III of plaintiff's complaint.

[fol. 17]

IV

Defendants admit the allegations set forth in paragraph IV of plaintiff's complaint.

V

Defendants admit the allegations set forth in paragraph V of plaintiff's complaint.

VI

Defendants admit the allegations set forth in paragraph VI of plaintiff's complaint.

VII

Defendants admit the allegations set forth in paragraph VII of plaintiff's complaint.

VIII

Defendants admit all of the allegations set forth in paragraph VIII of plaintiff's complaint with the exception of those allegations contained in the third paragraph thereof, which allegations defendants deny for the reason that they do not have sufficient information to form a belief with reference to the truth thereof.

IX

Defendants admit all of the allegations set forth in paragraph IX of plaintiff's complaint with the exception of those allegations contained in the first paragraph thereof, which allegations defendants specifically deny; with the further exception of that part of paragraph two thereof reading "that since the enactment of said statute as hereinbefore alleged, said plaintiff has been deprived of the right and privilege to import said brands and to sell the same as a wholesaler in the State of Minnesota" which allegation defendants specifically deny; with the further exception of that part of paragraph three thereof reading "that the liquor [fol. 18] manufactured by plaintiff and sold by him under the brands listed on Exhibit 'A' are identical in kind, in-

gredients and quality with liquors being sold in Minnesota by manufacturers and jobbers in Minnesota under brands registered in the patent office of the United States'' which allegation defendants deny for the reason that they do not have sufficient information to form a belief with reference to the truth thereof; with the further exception of those allegations contained in paragraph four thereof which allegations defendants deny for the reason that they do not have sufficient information to form a belief with reference to the truth thereof; with the further exception of that part of paragraph five thereof reading: ''That under the laws of the United States and the rules and regulations of the United States government adopted thereunder, said plaintiff having obtained a Federal license and permit to manufacture liquors in the city of Chicago, Illinois, cannot obtain a license and permit to manufacture and process intoxicating liquors in the State of Minnesota without abandoning and discontinuing said manufacturing business in the State of Illinois'' which allegation defendants specifically deny; with the further exception of the allegation set forth in paragraph six thereof, which allegation defendants specifically deny.

X

Defendants specifically deny each and every allegation set forth in paragraph X of plaintiff's complaint.

XI

Defendants admit the allegations set forth in paragraph XI of plaintiff's complaint with the exception of that part thereof reading: ''That this action is brought by said plaintiff on * * * behalf of all other manufacturers and wholesalers of intoxicating liquors similarly situated and who are [fol. 19] affected by the provisions of said statutory law hereinbefore set forth'' which allegation defendants deny for the reason that they do not have sufficient information to form a belief with reference to the truth thereof.

XII

Defendants specifically deny each and every allegation contained in paragraph XII of plaintiff's complaint.

XIII

Defendants admit the allegations set forth in paragraph XIII of plaintiff's complaint.

XIV

Defendants admit the allegations set forth in paragraph XIV of plaintiff's complaint.

XV

Defendants deny each allegation, matter and thing contained in plaintiff's bill of complaint except as herein admitted or qualified.

Wherefore: Defendants move the court that plaintiff's bill of complaint herein may be dismissed, and that defendants have and recover their costs and disbursements.

Harry H. Peterson, Attorney General; Frederic A. Pike, Deputy Attorney General; Roy C. Frank, Assistant Attorney General; Attorneys for Defendants, 102 State Capitol, St. Paul, Minnesota.

[fols. 20-22] *Duly sworn to by David R. Arundel. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 23] In United States District Court

[Title omitted]

Order for Substitution—Filed May 8, 1937

Upon the hereto attached stipulation it is hereby ordered and directed that William Mahoney be substituted as a defendant in the above entitled action in the place and stead of David R. Arundel; that Elmer A. Benson be substituted as a defendant in the above entitled action in the place and stead of Floyd B. Olson, and that William S. Ervin be substituted as a defendant in the above entitled action in the place and stead of Harry H. Peterson; that all future proceedings be entitled as against the substituted defendants; that the defendants David R. Arundel, Floyd B. Olson and Harry H. Peterson be discharged and released from any liability by reason of the above action; and that the interlocutory injunction heretofore issued by this Court in said action continue in full force and effect against the

substituted defendants until such time as the court shall otherwise order.

Dated at Minneapolis, Minnesota, this 8 day of May 1937.

Gunnar H. Nordbye, Judge.

[File endorsement omitted.]

[fol. 24] In United States District Court, District of Minnesota, Fourth Division.

In Equity. No 2836

Joseph Triner Corporation, a Corporation, Plaintiff,

vs.

William Mahoney, as Liquor Control Commissioner of the State of Minnesota; William S. Ervin, Attorney General of the State of Minnesota, and Elmer Benson, Governor of the State of Minnesota, Defendants

In Equity. No. 2839

Frank McCormick, Incorporated, a Corporation, Plaintiff,

vs.

William Mahoney, as Liquor Control Commissioner of the State of Minnesota; William S. Ervin, Attorney General of the State of Minnesota, and Elmer A. Benson, Governor of the State of Minnesota, Defendants

Opinion—Filed October 23, 1937

These suits, which were brought to enjoin the enforcement of Chapter 390 of the Laws of Minnesota for 1935, came on to be tried before this Court on April 9, 1937, and were, by agreement of the parties, submitted together upon stipulations of fact and written briefs.

[fol. 25] Messrs. Bradford, Cummins & Cummins appeared for and filed a brief on behalf of the plaintiff Joseph Triner Corporation.

Mr. Thomas Gallagher appeared for and filed a brief on behalf of the plaintiff Frank McCormick, Incorporated.

Mr. G. H. Braddock, with permission of the Court, filed a brief as amicus curiæ.

Mr. William S. Ervin, Attorney General of the State of Minnesota, and Mr. Roy C. Frank, Assistant Attorney General of the State of Minnesota, appeared for and filed a brief for the defendants.

These are the same suits in which this Court granted preliminary injunctions on June 29, 1935. (11 F. Supp. 145.) The fact situation remains unchanged except for the substitution of the present defendants for their predecessors in office. The facts are sufficiently stated in our opinion granting the preliminary injunctions and will not be repeated. The plaintiffs are wholesalers and licensed to sell liquor in the State of Minnesota.

Chapter 390 of the Laws of Minnesota, 1935, provides:

> "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

The ground upon which we granted the preliminary injunctions in these cases was that the classifying of brands of imported liquor on the basis of their registration in the Patent Office of the United States and the forbidding of the sale of imported brands not registered in the Patent Office had no reasonable relation to the regulation of the liquor traffic within the State of Minnesota, and that the classification adopted by the Legislature of Minnesota was purely arbitrary and unreasonable and therefore violated [fol. 26] the equal protection clause of the Federal Constitution.*

Our attention has now been directed to the decision of the District Court of the Southern District of California in Young's Market Co., et al. v. State Board of Equalization of California, et al., 12 F. Supp. 140, in which case an injunction was granted by that court against the enforcement of a law of California which imposed an annual license tax on wholesalers selling beer imported from other states into

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* An interesting discussion of these cases and the questions involved will be found in Cornell Quarterly, Vol. XXI, No. 3, page 504.

California, upon the ground that the statute violated both the commerce clause and the equal protection clause of the Federal Constitution because wholesalers selling beer made in California were not required to pay this license tax and therefore the wholesalers of imported beer were unreasonably discriminated against. The Supreme Court of the United States reversed the District Court in State Board v. Young's Market Co., 299 U. S. 59. The District Court in granting the injunction against the enforcement of the California statute there challenged, had relied to some extent upon our decision granting preliminary injunctions in these cases. Unless the situation with which we are confronted is distinguishable from that passed upon by the District Court of the Southern District of California and by the Supreme Court, we should reverse our holding and deny permanent injunctions.

A careful comparison of the cases therefore becomes necessary. In the cases before us, the plaintiffs—like the plaintiffs in the California case—are wholesalers licensed to do business in the State. The Minnesota statute prohibits the importation of liquors of a certain alcoholic con-
[fol. 27] tent which are ready for sale without further processing, unless the brands of such liquors are registered in the Patent Office of the United States. In the California case the law prohibited a licensed wholesaler from dealing in beer imported from without the State unless he paid, in addition to his wholesaler's license fee, the importer's license fee or tax required of a wholesaler who sold beer imported into California. The discrimination complained of in the California case was that which arose between wholesalers who sold domestic beer and those who sold imported beer. Those who sold domestic beer were not required to pay the importer's license fee, while those who sold imported beer were required to pay it. The Minnesota statute discriminates between wholesalers who handle imported brands of liquor which are not registered in the Patent Office and those who handle imported brands of liquor which are registered in the Patent Office. It discriminates between those who import liquor requiring further processing in Minnesota and those importing liquor which does not require further processing in Minnesota. Imported liquor requiring further processing in the State may be sold in the State whether the brand is registered or not, whereas the same kind and quality of liquor, if it

is imported into the State ready for sale, can only be sold provided the brand is registered. Those who sell only liquor manufactured in Minnesota are not affected by the law, while those who import liquor of equal goodness may not sell it in the State unless it bears a registered brand.

It seems to us that there is a vast distinction between levying a uniform license tax upon wholesalers dealing in imported liquor, and prohibiting a licensed wholesaler from [fol. 28] dealing in imported liquor ready for sale, merely because the brand or trade name by which the liquor is known is not registered in the Patent Office. Licensing and imposing license fees and taxes is an ancient and well-recognized method of regulating businesses of all kinds, but, so far as we are aware, no other attempt has ever been made by a State to regulate and control the importation of intoxicating liquor because of the registration or nonregistration in the Patent Office of the trade name which is applied to it. If we were convinced that the statute here in question had any reasonable relation to the regulation or control of the liquor traffic within the State of Minnesota, we would unhesitatingly dismiss these suits. If there in fact exists a reasonable basis for permitting the importation of liquor bearing a registered brand and for prohibiting the importation of the same kind and quality of liquor bearing an unregistered brand or a brand which is not subject to registration, we are unable to visualize it. We can see a relation between the United States Pure Food and Drug Act and the kind of liquor which is offered to the public for consumption, but we can see no relation between the laws of the United States which permit the registration of certain trade names in the Patent Office and the kind and quality of liquor which is offered to the public.

We have read with great care the decision of the Supreme Court of the United States in the California case referred to. That Court held that under the Twenty-first Amendment a State may exact a license fee for the privilege of importing beer from other states; that the Twenty-first Amendment abrogated the right to import free so far as intoxicating liquors were concerned; and that the imposi- [fol. 29] tion of the importer's license fee by the State of California was not in violation of the commerce clause of the Federal Constitution. The contention that the California statute violated the equal protection clause, the Supreme

Court disposed of in the following language (page 64 of 299 U. S.):

> "Second. The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment. Beer sold within the State comes from two sources. The brewer of the domestic article may be required to pay a license-fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compare Brown-Forman Co. v. Kentucky, 217 U. S. 563. The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license-fee of $500. Compare Kidd v. Alabama, 188 U. S. 730, 732."

In discussing the claim that the statute violated the commerce clause, the Supreme Court made this statement (page 62 of 299 U. S.):

> "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."

If that language be construed to mean that a State may impose any conditions with respect to importations of intoxicating liquors, whether arbitrary and unreasonable or not, it sustains the contention which the defendants here make that, regardless of whether the statute of Minnesota has a reasonable or an unreasonable relation to the subject-matter, it must, nevertheless, be sustained. It is to be noted, however, that the Supreme Court expressly found it unnecessary to declare that the Twenty-first Amendment, [fol. 30] with respect to liquor, had freed the States from all restrictions upon their police power which are to be found in the Constitution of the United States. It seems fair to assume, under the circumstances, that the Supreme Court

was by no means convinced that the Twenty-first Amendment left the States free from the restrictions of the equal protection clause in dealing with intoxicating liquor.

We are not convinced that our conclusion that the Minnesota statute here assailed was invalid as violating the equal protection clause of the Constitution, was wrong; and, in the absence of a decision of the Supreme Court of the United States holding that a State may, by virtue of the Twenty-first Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquor which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the Fourteenth Amendment, we think this Court ought not so to declare.

The injunctions heretofore granted will be made permanent; and the plaintiffs may present findings of fact and conclusions of law conforming to the equity rules, and appropriate decrees.

Dated this 23d day of October, 1937.

John B. Sanborn, United States Circuit Judge; Gunnar H. Nordbye, United States District Judge; Matthew M. Joyce, United States District Judge.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 27, 1937

The above entitled suit came on regularly for trial before a Court consisting of three Judges, as required by law, on the 9th day of April, 1937, Messrs. Bradford, Cummins and Cummins appearing on behalf of the plaintiff, and Mr. William S. Ervin, Attorney General of the State of Minnesota, and Mr. Roy C. Frank, Assistant Attorney General of the State of Minnesota appearing on behalf of the defendants;

From the pleadings in the action and the stipulated facts, and all of the files and records herein, the Court makes the following

Findings of Fact

I

That said plaintiff is now and during all of the times hereinafter mentioned was a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois.

[fol. 32]

II

That said plaintiff is a citizen and resident of the State of Illinois, and its home office and place of business is at 1333-1339 South Ashland Avenue in the City of Chicago, Illinois.

III

That said plaintiff is now and during all of the times hereinafter mentioned was under and by virtue of the terms and provisions of its charter engaged in the business of manufacturing intoxicating liquors for sale, and in selling intoxicating liquors as a wholesaler, to retail dealers in intoxicating liquors; that said plaintiff's manufacturing plant is situated at the address above named in the City of Chicago, Illinois.

IV

That on the 19th day of February, 1934, said plaintiff did in all things comply with the Statutes of the State of Minnesota governing and affecting foreign corporations, and was on said date duly licensed by the State of Minnesota to engage in business in said State as a foreign corporation.

V

That upon being duly licensed to do business in the State of Minnesota, the plaintiff did on or about February 19th, 1934, establish an office, warehouse and place of business in the City of Saint Paul, Ramsey County, Minnesota, and within the jurisdiction of the above entitled Court, which office and place of business has ever since said date and is now being conducted, operated and maintained by said plaintiff.

VI

That the business of said plaintiff as operated and carried on in the State of Minnesota is that of a wholesaler engaged in the business of selling intoxicating liquors to retailers.

[fol. 33]

VII

That said plaintiff during the times herein mentioned has carried a stock of merchandise at its place of business in Saint Paul, Minnesota of the approximate worth and value of Twenty Thousand Dollars ($20,000.00).

VIII

That on or about the 5th day of December, 1933, said plaintiff was given and granted a license and permit by the Federal Alcohol Control Administration of the Government of the United States to manufacture intoxicating liquors and sell the same at wholesale which said Federal license and permit said plaintiff now holds and the same is in full force and effect.

IX

That when this case was commenced, David R. Arundel, as Liquor Control Commissioner of the State of Minnesota, Harry Peterson, Attorney General of the State of Minnesota, and Floyd B. Olson, Governor of the State of Minnesota, were named as defendants in this action;

That after the action was commenced, the defendants, whose names now appear in the title of this action, were substituted in place and in lieu of the parties above named as their successors in office.

X

That on the 19th day of February, 1934, said plaintiff was issued a State license and permit to manufacture intoxicating liquors and to sell the same in the State of Minnesota as a wholesaler by said David R. Arundel as Liquor Control Commissioner of the State of Minnesota as he was authorized to do by the laws of said State; that said State license and permit is now and during all times herein mentioned has been in full force and effect.

XI

That said David R. Arundel, at the time of the commencement of this action and for some time prior thereto and thereafter was the duly appointed, qualified and acting Liquor Control Commissioner of the State of Minnesota [fol. 34] with full power and authority appertaining to that

office under and by virtue of the laws of said State; that he was a citizen and resident of the City of Minneapolis, Hennepin County, Minnesota;

That said Harry Peterson at the time of the commencement of said action and for some time prior thereto and thereafter was the duly elected, qualified and acting Attorney General of the State of Minnesota, and a citizen and resident of the City of Saint Paul, Ramsey County, Minnesota;

That said Floyd B. Olson, at the time of the commencement of this action and for some time prior thereto and thereafter, was the duly elected, qualified and acting Governor of the State of Minnesota, and a citizen and resident of the City of Minneapolis, Hennepin County, Minnesota.

XII

That for the purpose of complying with the laws of the State of Minnesota and the rules and regulations of David R. Arundel, as Liquor Control Commissioner of said State, the plaintiff herein did, prior to the commencement of this action, register and file with the said Liquor Control Commissioner the various brands of liquor which said plaintiff proposed and intended to sell at wholesale in the State of Minnesota, and which said plaintiff, as manufacturer, intended to import into the State of Minnesota for the purpose of sale; that Exhibit "A" attached to plaintiff's complaint truly and correctly shows the names of said brands of liquor and the dates on which the same were filed and registered with said Liquor Control Commissioner; that said Exhibit "A" is hereby made a part hereof by reference;

That at the time of filing and registering said brands with the Liquor Control Commissioner of Minnesota said plaintiff furnished to said Commissioner and filed with said brands, a chemical analysis of each of said brands of liquor, which chemical analysis was accepted and approved by said Liquor Control Commissioner and said plaintiff was granted full right, permission and authority to import said brands of [fol. 35] liquor into the State of Minnesota and to sell the same at wholesale in said State;

That each and all of said brands of liquor were manufactured by said plaintiff at its manufacturing plant and place of business in the City of Chicago, Illinois.

That since February 19th, 1934 said plaintiff has shipped in interstate commerce from the City of Chicago, Illinois to its warehouse and place of business in the City of Saint Paul, Minnesota, intoxicating liquors manufactured by it aggregating in amount the sum of approximately Ninety Thousand Dollars ($90,000.00); that said liquor so shipped into Minnesota included all of the brands listed upon Exhibit "A" hereinbefore referred to; that when said liquor was received in the State of Minnesota and place in the warehouse, the same was resold by said plaintiff in the State of Minnesota to more than 250 retail dealers in intoxicating liquors in the State of Minnesota who in turn sold the same to consumers in said State; that all of said liquor shipped by the plaintiff into the State of Minnesota moved in the channels of interstate commerce;

XIII

That said plaintiff for the purpose of establishing and building up its business in the State of Minnesota has spent approximately Ten Thousand Dollars ($10,000.00) in advertising and sales promotion work; that said plaintiff has built up and established an extensive demand for each and all of the said brands of liquor listed on Exhibit "A", and has developed an extensive and valuable goodwill in and to each of said brands; that said plaintiff has popularized said brands of liquor with the consuming public, and has, since it was licensed to do business in the State of Minnesota, realized a net profit from the business carried on by it in the State of Minnesota of approximately Twelve Hundred Dollars ($1200.00) per month; that said business has been progressively increasing from month to month.

[fol. 36] XIV

That the Legislature of the State of Minnesota at its regular session in 1935 enacted Chapter 390 of the Session Laws of 1935 which reads as follows:

"An Act to Regulate the Importation of Intoxicating Liquor Containing More Than 25 Per Cent of Alcohol by Volume

Be it enacted by the Legislature of the State of Minnesota:

Section 1. No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors contain-

ing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

that said law was duly approved on the 29th day of April, 1935 and is now a part of the statutory law of the State of Minnesota; that after the enactment of said law said David R. Arundel, as liquor Control Commissioner of the State of Minnesota, notified said plaintiff that said law had been enacted and that said plaintiff should cease and desist as a manufacturer and wholesaler from importing any brand or brands of intoxicating liquors containing more than 25% of alcohol by volume ready for sale without further processing unless such brand or brands were duly registered in the patent office of the United States.

XV

That none of said brands listed on Exhibit "A" have ever been registered in the patent office of the United States and that each and all of said brands contain more than 25% of alcohol by volume, and that each and all of said brands so imported by the plaintiff in the State of Minnesota are finished products and no further processing is necessary;

That since the enactment of said law by the Legislature of Minnesota, said plaintiff has been prevented by the Liquor Control Commissioner of the State of Minnesota, from importing any of said brands into the State of Minnesota as a manufacturer and from selling any of said brands in the State of Minnesota as a wholesaler.

[fol. 37] That at the time said law was enacted plaintiff herein had a stock of merchandise consisting of said brands listed on Exhibit "A", attached to plaintiff's bill of complaint, in the State of Minnesota amounting to approximately Twenty Thousand Dollars ($20,000.00) which stock of merchandise said plaintiff has been permitted to sell and deliver to its customers in the State of Minnesota after the enactment of said law; that said stock of merchandise at the time of the commencement of this action had been exhausted and plaintiff had unfilled orders on hands for brands of liquor listed in Exhibit "A", attached to plaintiff's bill of complaint, amounting to approximately One

Thousand Dollars ($1,000.00) and said plaintiff was forced to reject orders in the amount of approximately Five Thousand Dollars ($5,000.00) for brands of liquor listed on said Exhibit "A", for the reason that said plaintiff had been unable to accept said orders and to fill the same for the reasons above stated;

That because of said law and the attempt to enforce the same by the Liquor Control Commissioner said plaintiff has been obliged to lay off his traveling salesmen, desist in advertising said brands of liquor, and in promoting its business in the State of Minnesota and that said conditions above set forth will again result if said law is enforced and sustained.

XVI

That on account of said law and the acts and conduct of said Liquor Control Commissioner thereunder, as hereinbefore alleged, the said plaintiff's business has been practically closed in the State of Minnesota; that the property and business of said plaintiff in the State of Minnesota, including said plaintiff's goodwill and said brands listed on Exhibit "A", is of the worth and value of Thirty Thousand Dollars ($30,000.00); that unless said plaintiff is permitted to import said brands of liquor in the State of Minnesota and to sell the same at wholesale in the future as it has been privileged and permitted to do in the past, the business of said plaintiff in the brands listed on Exhibit [fol. 38] "A", attached to plaintiff's bill of complaint, will be completely and totally destroyed and said brands for use in the State of Minnesota will be rendered of no value in said State and said plaintiff will be deprived not only of said property and business of the value of Twenty Thousand Dollars ($20,000.00), but will be deprived of future profits which said plaintiff believes will amount to at least the sum of Ten Thousand Dollars ($10,000.00) per year for an indefinite period of time;

That in addition to selling at wholesale the brands of liquor listed upon Exhibit "A", which are brands owned by said plaintiff, said plaintiff has imported into the State of Minnesota through the channels of interstate commerce brands of liquor manufactured by other manufacturing concerns which brands were duly registered with the said Liquor Control Commissioner and permits issued for the sale thereof; that said brands of liquor when so imported by

said plaintiff were sold by it as a wholesaler in the State of Minnesota with the approval of the said Liquor Control Commissioner and in conformity with law; that since the enactment of said statute, as hereinbefore alleged, said plaintiff has been deprived of the right and privilege to import said brands and to sell the same as a wholesaler in the State of Minnesota without first registering said brands in the United States patent office as provided in said statute;

That since April 29th, 1935 there have been and are now citizens and residents of the State of Minnesota engaged in the business of importing brands of intoxicating liquors into the State of Minnesota containing more than 25% of alcohol by volume for the purpose of further processing the same in the State of Minnesota which said brands are not now and never have been registered in the patent office of the United States; that said liquor so imported is being processed in Minnesota and sold at wholesale in Minnesota and in other states in interstate commerce without said brands being registered in the patent office of United States; that under said statutory law, hereinbefore set forth, it [fol. 39] is unnecessary for said brands to be registered in the patent office; that there are a large number of manufacturers and wholesalers of intoxicating liquors who, under the provisions of said statute and with the permission of the said Liquor Control Commissioner, are engaged in importing from other states through the channels of interstate commerce into the State of Minnesota intoxicating liquors containing more than 25% of alcohol by volume under trade marks which have been registered in the patent office of the United States; that the liquor manufactured by plaintiff and sold by him under the brands listed on Exhibit "A" are in some cases identical in kind, ingredients and quality with liquors being sold in Minnesota by manufacturers and jobbers in Minnesota under brands registered in the patent office of the United States; that the registration of brands in the patent office of the United States is not in any way dependent upon the kind, ingredients or quality of the liquor to which the brand is affixed;

That at least six (6) months will be required from and after the date hereof to register each of said brands listed on Exhibit "A" in the patent office of the United States; that to register said brands the plaintiff would be required

to lay out and expend approximately the sum of Sixteen Hundred Dollars ($1600.00); that should oppositions to any of said registrations be filed, a greater period than six (6) months would be required to obtain said registrations and the cost of said registration would be materially and substantially increased over and above said figure of Sixteen Hundred Dollars ($1600.00); that while the brands of said plaintiff listed on Exhibit "A" have been duly approved by said Liquor Control Commissioner of Minnesota and sold in the State of Minnesota and while said plaintiff has acquired valuable property rights therein, that because of the nature and character of said brands, there is a reasonable probability that some of the same cannot be registered in the patent office of the United States;

[fol. 40] That in addition to shipping its manufactured product into the State of Minnesota, as hereinbefore alleged, said plaintiff has been and now is engaged in shipping said brands of liquor listed on Exhibit "A" in interstate commerce in various states of the United States; that said plaintiff has extensively advertised said brands throughout the United States and spent large sums of money in and about the creation of a demand for said brands of liquor;

That the effect of Chapter 390, as hereinbefore set forth, would substantially and materially effect the cost of transacting plaintiff's business in interstate commerce in other parts of the United States;

That said plaintiff employs in its manufacturing plant in the City of Chicago, Illinois 120 employees who are engaged in and about the manufacture of intoxicating liquors; that more than 200 manufacturers and wholesalers of intoxicating liquors have been duly licensed to sell their various brands in the State of Minnesota, which brands have not been registered in the patent office of the United States; that each of said manufacturers and importers is directly affected by said statutory law.

XVII

That this action is brought by said plaintiff on its own behalf and on behalf of all other manufacturers and wholesalers of intoxicating liquors similarly situated and who are affected by the provisions of said statutory law hereinbefore set forth; that the question of the constitutionality of said statute is one of common and general interest to

many persons constituting a class so numerous as to make it impracticable to bring them all before the court.

XVIII

That said plaintiff has no plain, speedy and adequate remedy at law.

[fol. 41] XIX

That the jurisdiction of this court depends on the following grounds:

a. This is a suit of a civil nature in equity arising under the Constitution of the United States to enjoin the enforcement of the Statute hereinbefore set forth of the State of Minnesota on the ground that said statute violates the Federal Constitution and the rights of the plaintiff hereunder, and that the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

b. This is a suit of a civil nature in equity between citizens of different states therein the amount in controversy exceeds, exclusive of interest or costs, the sum or value of $3,000.00.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I

That the plaintiff is entitled to the decree of this court adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935 is in all things unconstitutional and void.

II

That the plaintiff is entitled to the decree of this Court:

(a) Enjoining and restraining said defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(b) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor

Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

[fol. 42] (c) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25% of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

Dated: November 27th, 1937.

John B. Sanborn, United States Circuit Judge; Gunnar H. Nordbye, United States District Judge; Matthew M. Joyce, United States District Judge.

[File endorsement omitted.]

[fol. 43] In United States District Court, District of Minnesota, Fourth District

Joseph Triner Corporation, a Corporation, Plaintiff,

vs.

William Mahoney, as Liquor Control Commissioner of the State of Minnesota; William S. Ervin, Attorney General of the State of Minnesota; and Elmer Benson, Governor of the State of Minnesota, Defendants

Decree—Filed November 27, 1937

This cause came on to be heard before a three Judge Court at this term, and was argued by counsel. Thereupon, upon consideration thereof,

It was Ordered, Adjudged and Decreed as follows:

I

That Chapter 390 of the Session Laws of Minnesota of 1935, and the whole thereof, is in all things unconstitutional and void.

II

It is Further Ordered, Adjudged and Decreed that said defendants, and each of them, are hereby permanently restrained and enjoined from doing the following acts and things:

[fols. 44-48] (a) Making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(b) From making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) From interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25% of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the patent office of the United States.

Dated: November 27th, 1937.

John B. Sanborn, United States Circuit Judge; Gunnar H. Nordbye, United States District Judge; Matthew M. Joyce, United States District Judge.

[File endorsement omitted.]

[fols. 49-61] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed December 24, 1937

Counsel having stipulated to waive the bond for costs in the above entitled case, the foregoing petition is hereby granted and the appeal of the defendants and each of them is hereby allowed.

Dated December 24, 1937.

Matthew M. Joyce, Judge of the United States District Court.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF EVIDENCE ON APPEAL—Filed January 28, 1938

This cause came on for hearing before the three-judge court organized under the provisions of Section 380 of the United States Code Annotated, the Honorable John B. Sanborn, Judge of the United States Circuit Court of Appeals, Eighth Circuit, and the Honorable Gunnar H. Nordbye and Mathew M. Joyce, Judges of the United States District Court for the District *Court* of Minnesota, Fourth Division, Judges of said Court, on the 9th day of April, 1937, upon the Bill of Complaint of the plaintiff praying for a permanent injunction in said cause. The cause was submitted, by the stipulation of the parties, through their respective counsel and the consent of the Court, upon written stipulation of facts and upon written briefs. This stipulation of facts filed with the Clerk is by reference made a part of this statement of evidence.

It was stipulated that the issues for the determination of this Court are of law and not of fact, the said defendants [fol. 63] conceding that the allegations of plaintiff's Bill of Complaint having to do with or referring to the jurisdiction of this Court with respect to the fact that the plaintiff is a corporation duly organized under the laws of the State of Illinois and was, at the time of the hearing of said cause, doing business in the State of Minnesota as a wholesaler of intoxicating liquors and was duly licensed to so do, and that plaintiff had registered and filed with the Liquor Control Commissioner of the State of Minnesota the various brands of intoxicating liquors imported by it into the State of Minnesota, together with a chemical analysis of each brand, and that under the provisions of Chapter 390, Minnesota Laws of 1935, the plaintiff would be required to register said brand names in the Patent Office of the United States before it could import said brands of intoxicating liquor into the State of Minnesota without further processing, and that many of said brand names could not be registered in the Patent Office of the United States, and that plaintiff's business will suffer at least $10,000.00 each year if said law is enforced, and that defendants have threatened to, and

unless they are enjoined from so doing, will enforce all of the provisions of Chapter 390, Minnesota Laws of 1935, against this plaintiff and others similarly situated, are true.

William S. Ervin, Attorney General; Roy C. Frank, Assistant Attorney General; Solicitors for Defendants, 102 State Capitol, St. Paul, Minnesota.

[File endorsement omitted.]

[fols. 64-70] In United States District Court

[Title omitted]

Order Allowing Statement of Evidence—Filed January 28, 1938

The above entitled matter came on for hearing on January 28, 1938, on the application of William S. Ervin, Attorney General, and Roy C. Frank, Assistant Attorney General, Solicitors for the Defendants, for the approval and allowance of the Statement of Evidence on Appeal, lodged in the office of the Clerk of this Court on the 18th day of January, 1938. The Court finding the said Statement of Evidence to be true, complete and properly prepared,

It Is Hereby Ordered, that the said Statement of Evidence on Appeal is allowed, settled and approved, and filed as the Statement of Evidence to be included in the record on appeal in the above entitled cause, as provided by Equity Rule 75 (b).

Dated this 28th day of January, 1938.

John B. Sanborn, Judge of Circuit Court of Appeals, Eighth Circuit.

[File endorsement omitted.]

[fol. 71] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 761

JOSEPH TRINER CORPORATION, a Corporation, Plaintiff,

vs.

WILLIAM MAHONEY, as Liquor Control Commissioner of the State of Minnesota; William S. Ervin, Attorney General of the State of Minnesota; and Elmer Benson, Governor of the State of Minnesota, Defendants

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed February 10, 1938

Come now the appellants in the above entitled cause and in support of their appeal hereby file their definite statement of the points on which they intend to rely in said appeal, and hereby state such points to be as follows:

That the District Court of the United States, for the District of Minnesota, Fourth Division, and the special three-judge court organized and sitting therein, erred:

I

In determining as a conclusion of law that the plaintiff was entitled to the decree of the court adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935 is in all things unconstitutional and void.

II

In determining as a conclusion of law that the plaintiff was entitled to the decree of the Court.

(a) Enjoining and restraining the defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session [fol. 72] Laws of Minnesota of 1935;

(b) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement

of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

III

In rendering and entering its final decree

(a) Adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935, to be, in all things, unconstitutional and void;

(b) Enjoining and restraining the defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

[fol. 73] (d) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

IV

In its failure to hold that Chapter 390 of the Laws of Minnesota of 1935 was constitutional.

V

In its failure to dismiss the plaintiff's bill of complaint.

And appellants further state that only the following parts of the record, as filed in this court, need be printed by the clerk for the hearing of the cause:

1. Bill of Complaint.
2. Answer.
3. Order allowing substitution of defendants.
4. Opinion.
5. Findings of fact and conclusion of law.
6. Final decree.
7. Order allowing appeal.
8. Statement of evidence and order allowing the same.
9. Statement of points to be relied upon and designation as to printing record.

William S. Ervin, Attorney General; Roy C. Frank, Assistant Attorney General, 102 State Capitol Building, St. Paul, Minnesota, Solicitors for Defendants.

[fol. 74] Service of the foregoing Statement of points to be Relied Upon and Designation of the Parts of the Record to be Printed is hereby acknowledged this 9th day of February, 1938.

Bradford, Cummins and Cummins, Solicitors for Appellees.

[fol. 75] [Endorsed:] In Supreme Court of the United States, No. 761, October Term, 1937. Joseph Triner Corporation, a Corporation, Plaintiff, vs. William Mahoney, as Liquor Control Commissioner of the State of Minnesota, William S. Ervin, Attorney General of the State of Minnesota; and Elmer Benson, Governor of the State of Minnesota, Defendants. Statement. William S. Ervin, Attorney General; Roy C. Frank, Assistant Attorney General, 102 State Capitol Building, St. Paul, Minnesota, Solicitors for Defendants.

[fol. 76] [File endorsement omitted.]

Endorsed: File No. 42,242. Minnesota, D. C. U. S. Term No. 761. William Mahoney, as Liquor Control Commissioner of the State of Minnesota, et al., Appellants, vs. Joseph Triner Corporation. Filed February 7, 1938. Term No. 761, O. T. 1937.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 761

WILLIAM MAHONEY, AS LIQUOR CONTROL COMMISSIONER OF THE STATE OF MINNESOTA, ET AL.,

Appellants,

vs.

JOSEPH TRINER CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

STATEMENT AS TO JURISDICTION.

WILLIAM S. ERVIN,
Attorney General of Minnesota;
ROY C. FRANK,
Assistant Attorney General of Minnesota,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

IN EQUITY.

No. 2836

JOSEPH TRINER CORPORATION, A CORPORATION,
Plaintiff,

vs.

WILLIAM MAHONEY, AS LIQUOR CONTROL COMMISSIONER OF THE STATE OF MINNESOTA; WILLIAM S. ERVIN, ATTORNEY GENERAL OF THE STATE OF MINNESOTA; AND ELMER BENSON, GOVERNOR OF THE STATE OF MINNESOTA,
Defendants.

STATEMENT DISCLOSING JURISDICTION.

Come now the defendants above named, and each of them, and concurrently with the presentation of their petition for the allowance of an appeal from the District Court of the United States, District of Minnesota, Fourth Division, being a specially constituted three-judge court under Title 28, Section 380 of the United States Code Annotated, to the Supreme Court of the United States, herewith and hereby present this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the decree from which said appeal is taken.

A. Statutes Sustaining the Jurisdiction.

Title 28, Section 380 of the United States Code Annotated:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

Title 28, Section 345 of the United States Code Annotated:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:
>
> * * * * * * *
>
> (3) Section 380 of this title.
>
> * * * * * * *"

B. State Statute, the Validity of Which is Involved.

Laws of Minnesota of 1935, Chapter 390, Page 720, Section 1, constituting the entire Act.

The foregoing Act reads in its entirety as follows:

> "CHAPTER 390—S. F. No. 1509.
>
> AN ACT to regulate the importation of intoxicating liquor containing more than 25 per cent of alcohol by volume.
>
> Be it enacted by the Legislature of the State of Minnesota:
>
> SECTION 1. Certain liquor must be registered.—No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for

sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States.

Approved April 29, 1935."

C. Date of Decree and of Application for Appeal.

The date of the final decree sought to be reviewed is November 27, 1937; and the date upon which the application for appeal was presented is December 24, 1937.

In this cause plaintiff prayed in its verified bill of complaint that the district court declare a State law, Laws of Minnesota of 1935, Chapter 390, unconstitutional in that:

a. It is unreasonable, arbitrary, oppressive and discriminatory.

b. It denies to the plaintiff and others similarly situated the equal protection of the law.

c. It denies to the plaintiff the right to carry on a lawful business recognized and made lawful by the State of Minnesota, in a lawful manner.

d. It takes and destroys property and property rights of the plaintiff without just cause or reason and without just compensation.

e. It unreasonably and arbitrarily infringes upon the freedom of contract.

f. It effectively confiscates the property of the plaintiff without just compensation.

g. It is by its provisions in restraint of trade prohibitory of lawful acts done in the conduct of a lawful business.

h. It is class legislation enacted for the benefit of the manufacturers and wholesalers who own or control brands registered in the United States patent office at Washington, and for the benefit of manufacturers and wholesalers engaged in the business of manufacturing and processing liquor in the State of Minnesota who import liquor into said state for further processing.

i. It is arbitrary, discriminatory and unreasonable interference with interstate commerce.

j. It has no relation to the public health, morals or welfare of the people of the State of Minnesota, and is enacted for the avowed purpose of discriminating against manufacturers and laborers engaged in processing liquor outside of the State of Minnesota and in favor of manufacturers, laborers and citizens engaged in the processing and manufacturing of liquor within the State of Minnesota.

k. It denies said plaintiff and other manufacturers and wholesalers similarly situated with the equal protection of the law.

Plaintiff further prayed the court for a permanent injunction, and made a motion for an interlocutory injunction, restraining the defendants, as officers of the State of Minnesota, from enforcing the provisions of said Chapter 390, and from interfering in any manner with the plaintiff in the importation into and the sale in the State of Minnesota of intoxicating liquors, the brand names of which have not been registered in the patent office of the United States as required by Chapter 390.

On June 29, 1935, the district court granted plaintiff's motion for an interlocutory injunction and on November 27, 1937, entered its final decree, from which this appeal is taken, determining Chapter 390 to be unconstitutional and permanently enjoining the defendants from enforcing the provisions of said Chapter 390.

This cause involves (1) the constitutionality of a state law; and (2) the enjoining of the action of state officers in the enforcement of a state law, and is appealable directly to the Supreme Court of the United States under the provisions of Title 28, Section 380 of the United States Code Annotated.

The cases sustaining the jurisdiction of the court in these premises are:

Ex Parte Collins, 277 U. S. 565;

Oklahoma Gas and Electric Co. v. *Packing Co.*, 292 U. S. 386:

State Board of Equalization of California v. *Young's Market Company*, 299 U. S. 59.

WILLIAM S. ERVIN,
Attorney General;
ROY C. FRANK,
Assistant Attorney General,
102 State Capitol,
St. Paul, Minnesota,
Solicitors for Defendants.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION.

In Equity. No. 2836.

JOSEPH TRINER CORPORATION, a Corporation, *Plaintiff*,

vs.

WILLIAM MAHONEY, as Liquor Control Commissioner of the State of Minnesota; WILLIAM S. ERVIN, Attorney General of the State of Minnesota, and ELMER BENSON, Governor of the State of Minnesota, *Defendants*.

In Equity. No. 2839.

FRANK McCORMICK, INCORPORATED, a Corporation, *Plaintiff*,

vs.

WILLIAM MAHONEY, as Liquor Control Commissioner of the State of Minnesota; WILLIAM S. ERVIN, Attorney General of the State of Minnesota, and ELMER A. BENSON, Governor of the State of Minnesota, *Defendants*.

These suits, which were brought to enjoin the enforcement of Chapter 390 of the Laws of Minnesota for 1935, came on to be tried before this Court on April 9, 1937, and were, by agreement of the parties, submitted together upon stipulations of fact and written briefs.

Messrs. Bradford, Cummins & Cummins appeared for and filed a brief on behalf of the plaintiff Joseph Triner Corporation.

Mr. Thomas Gallagher appeared for and filed a brief on behalf of the plaintiff Frank McCormick, Incorporated.

Mr. G. H. Braddock, with permission of the Court, filed a brief as amicus curiæ.

Mr. William S. Ervin, Attorney General of the State of Minnesota, and Mr. Roy C. Frank, Assistant Attorney General of the State of Minnesota, appeared for and filed a brief for the defendants.

These are the same suits in which this Court granted preliminary injunctions on June 29, 1935. (11 F. Supp. 145.) The fact situation remains unchanged except for the substitution of the present defendants for their predecessors in office. The facts are sufficiently stated in our opinion granting the preliminary injunctions and will not be repeated. The plaintiffs are wholesalers and licensed to sell liquor in the State of Minnesota.

Chapter 390 of the Laws of Minnesota, 1935, provides:

> "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

The ground upon which we granted the preliminary injunctions in these cases was that the classifying of brands of imported liquor on the basis of their registration in the Patent Office of the United States and the forbidding of the sale of imported brands not registered in the Patent Office had no reasonable relation to the regulation of the liquor traffic within the State of Minnesota, and that the classification adopted by the Legislature of Minnesota was purely arbitrary and unreasonable and therefore violated the equal protection clause of the Federal Constitution.*

Our attention has now been directed to the decision of the District Court of the Southern District of California in Young's Market Co., et al. v. State Board of Equalization of California, et al., 12 F. Supp. 140, in which case an injunction was granted by that court against the enforcement of a law of California which imposed an annual license tax on wholesalers selling beer imported from other states into California, upon the ground that the statute violated both the commerce clause and the equal protection clause of the Federal Constitution because wholesalers selling beer made in California were not required to pay this license tax and

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* An interesting discussion of these cases and the questions involved will be found in Cornell Quarterly, Vol. XXI, No. 3, page 504.

therefore the wholesalers of imported beer were unreasonably discriminated against. The Supreme Court of the United States reversed the District Court in State Board v. Young's Market Co., 299 U. S. 59. The District Court in granting the injunction against the enforcement of the California statute there challenged, had relied to some extent upon our decision granting preliminary injunctions in these cases. Unless the situation with which we are confronted is distinguishable from that passed upon by the District Court of the Southern District of California and by the Supreme Court, we should reverse our holding and deny permanent injunctions.

A careful comparison of the cases therefore becomes necessary. In the cases before us, the plaintiffs—like the plaintiffs in the California case—are wholesalers licensed to do business in the State. The Minnesota statute prohibits the importation of liquors of a certain alcoholic content which are ready for sale without further processing, unless the brands of such liquors are registered in the Patent Office of the United States. In the California case the law prohibited a licensed wholesaler from dealing in beer imported from without the State unless he paid, in addition to his wholesaler's license fee, the importer's license fee or tax required of a wholesaler who sold beer imported into California. The discrimination complained of in the California case was that which arose between wholesalers who sold domestic beer and those who sold imported beer. Those who sold domestic beer were not required to pay the importer's license fee, while those who sold imported beer were required to pay it. The Minnesota statute discriminates between wholesalers who handle imported brands of liquor which are not registered in the Patent Office and those who handle imported brands of liquor which are registered in the Patent Office. It discriminates between those who import liquor requiring further processing in Minnesota and those importing liquor which does not require further processing in Minnesota. Imported liquor requiring further processing in the State may be sold in the State whether the brand is registered or not, whereas the same kind and quality of liquor, if it

is imported into the State ready for sale, can only be sold provided the brand is registered. Those who sell only liquor manufactured in Minnesota are not affected by the law, while those who import liquor of equal goodness may not sell it in the State unless it bears a registered brand.

It seems to us that there is a vast distinction between levying a uniform license tax upon wholesalers dealing in imported liquor, and prohibiting a licensed wholesaler from dealing in imported liquor ready for sale, merely because the brand or trade name by which the liquor is known is not registered in the Patent Office. Licensing and imposing license fees and taxes is an ancient and well-recognized method of regulating businesses of all kinds, but, so far as we are aware, no other attempt has ever been made by a State to regulate and control the importation of intoxicating liquor because of the registration or nonregistration in the Patent Office of the trade name which is applied to it. If we were convinced that the statute here in question had any reasonable relation to the regulation or control of the liquor traffic within the State of Minnesota, we would unhesitatingly dismiss these suits. If there in fact exists a reasonable basis for permitting the importation of liquor bearing a registered brand and for prohibiting the importation of the same kind and quality of liquor bearing an unregistered brand or a brand which is not subject to registration, we are unable to visualize it. We can see a relation between the United States Pure Food and Drug Act and the kind of liquor which is offered to the public for consumption, but we can see no relation between the laws of the United States which permit the registration of certain trade names in the Patent Office and the kind and quality of liquor which is offered to the public.

We have read with great care the decision of the Supreme Court of the United States in the California case referred to. That Court held that under the Twenty-first Amendment a State may exact a license fee for the privilege of importing beer from other states; that the Twenty-first Amendment abrogated the right to import free so far as intoxicating liquors were concerned; and that the imposition of the importer's license fee by the State of California

was not in violation of the commerce clause of the Federal Constitution. The contention that the California statute violated the equal protection clause, the Supreme Court disposed of in the following language (page 64 of 299 U. S.):

> "Second. The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment. Beer sold within the State comes from two sources. The brewer of the domestic article may be required to pay a license-fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compare Brown-Forman Co. v. Kentucky, 217 U. S. 563. The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license-fee of $500. Compare Kidd v. Alabama, 188 U. S. 730, 732."

In discussing the claim that the statute violated the commerce clause, the Supreme Court made this statement (page 62 of 299 U. S.):

> "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."

If that language be construed to mean that a State may impose any conditions with respect to importations of intoxicating liquors, whether arbitrary and unreasonable or not, it sustains the contention which the defendants here make that, regardless of whether the statute of Minnesota has a reasonable or an unreasonable relation to the subject-matter, it must, nevertheless, be sustained. It is to be noted, however, that the Supreme Court expressly found

it unnecessary to declare that the Twenty-first Amendment, with respect to liquor, had freed the States from all restrictions upon their police power which are to be found in the Constitution of the United States. It seems fair to assume, under the circumstances, that the Supreme Court was by no means convinced that the Twenty-first Amendment left the States free from the restrictions of the equal protection clause in dealing with intoxicating liquor.

We are not convinced that our conclusion that the Minnesota statute here assailed was invalid as violating the equal protection clause of the Constitution, was wrong; and, in the absence of a decision of the Supreme Court of the United States holding that a State may, by virtue of the Twenty-first Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquor which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the Fourteenth Amendment, we think this Court ought not so to declare.

The injunctions heretofore granted will be made permanent; and the plaintiffs may present findings of fact and conclusions of law conforming to the equity rules, and appropriate decrees.

Dated this 23d day of October, 1937.

JOHN B. SANBORN,
United States Circuit Judge.
GUNNAR H. NORDBYE,
United States District Judge.
MATTHEW M. JOYCE,
United States District Judge.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 761

WILLIAM MAHONEY, AS LIQUOR CONTROL COMMISSIONER OF THE STATE OF MINNESOTA, ET AL.,

Appellants,

VS.

JOSEPH TRINER CORPORATION,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF APPELLANTS.

WILLIAM S. ERVIN,
Attorney General of Minnesota,
ROY C. FRANK,
Assistant Attorney General of Minnesota,
102 State Capitol,
St. Paul, Minnesota,
Counsel for Appellants.

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Appellants,

VS.

JOSEPH TRINER CORPORATION,

Appellee.

BRIEF OF APPELLANTS.

REPORT OF OPINION OF THE LOWER COURT.

The official report of the opinion of the District Court of the United States, District of Minnesota, Fourth Division, being a specially constituted three-judge court under Title 28, Section 380 of the United States Code Annotated, the lower court from which this appeal is taken in this proceeding, is found in 20 Fed. Supp. 1019.

STATEMENT OF THE FACTS.

Joseph Triner Corporation, the appellee herein, is and has been at all times mentioned herein a corporation organized under the laws of the State of Illinois (R. 22). Its business is that of manufacturing and rectifying alcoholic liquors for the purpose of sale (R. 22). Its manufacturing and rectifying plant is situated in Chicago, Illinois (R. 22). It has complied with the statutes of the State of Minnesota relative to foreign corporations doing business in that state, and on February 19, 1934, established an office, warehouse and place of business in the City of St. Paul, Minnesota, which office was conducted, operated and maintained by appellee during all of the time mentioned herein (R. 22). The business carried on by appellee in Minnesota was that of a wholesaler engaged in the sale of intoxicating liquors to retailers (R. 22). On the said 19th day of February, 1934, appellee was granted a license by the Liquor Control Commissioner of Minnesota, which license permitted appellee to manufacture intoxicating liquors and sell the same in Minnesota as a wholesaler (R. 23). The license was in full force and effect during all of the times herein mentioned (R. 23). Prior to the commencement of the above entitled action, appellee, in compliance with certain rules and regulations of the Liquor Control Commissioner of Minnesota, registered and filed with said Liquor Control Commissioner the various brand names of the intoxicating liquors which appellee intended to import into and sell in the State of Minnesota (R. 24). At the time of registering and filing said brand names, appellee further furnished the Liquor Control Commissioner a chemical analysis of each of said brands of liquor. Each analysis was accepted and permission was granted to appellee to import said brands of intoxicating liquors into

the State of Minnesota and sell the same therein at wholesale (R. 24). Each of said brands of intoxicating liquors was manufactured by appellee in Chicago, Illinois (R. 24). Since February 19, 1934, appellee has shipped from Chicago, Illinois to its warehouse and place of business in St. Paul, Minnesota, intoxicating liquors manufactured by it and bearing the brand names as registered and filed with the Liquor Control Commissioner of Minnesota aggregating in amount the sum of approximately ninety thousand dollars, which intoxicating liquors were sold in the State of Minnesota to more than two hundred and fifty retail dealers (R. 25). For the purpose of establishing and building up its business in the State of Minnesota, appellee has expended approximately ten thousand dollars in advertising and sales promotion work (R. 25). Appellee has built up and established an extensive demand for each of the said brands of intoxicating liquors and has realized a net profit from the business carried on by it in the State of Minnesota of approximately twelve hundred dollars per month (R. 25). On April 29, 1935, Laws of Minnesota, for 1935, Chapter 390 was enacted and in pursuance with the provisions thereof the Liquor Control Commissioner of Minnesota notified appellee to cease and desist from importing any brand or brands of intoxicating liquors containing more than twenty-five per cent of alcohol by volume ready for sale without further processing unless such brand or brands were duly registered in the patent office of the United States (R. 25-26). None of the brands of intoxicating liquors imported by appellee into the State of Minnesota have been registered in the patent office of the United States and they all are affected by said Chapter 390 (R. 26). By virtue of said law, appellee has been prevented from importing any of said brands into

Minnesota without first registering said brands in the patent office of the United States (R. 26). At least six months time is required to register a brand name with the patent office, and appellee would be required to expend approximately sixteen hundred dollars to register its brands (R. 28, 29). In the case of some of the brand names, a reasonable probability exists that they cannot be registered at all (R. 29). Since the enactment of Chapter 390, Laws of Minnesota for 1935, there have been, and there now are, citizens and residents of the State of Minnesota engaged in the business of importing brands of intoxicating liquors into the State of Minnesota containing more than twenty-five per cent of alcohol by volume for the purpose of further processing the same in the State of Minnesota, which said brands are not now and never have been registered in the patent office of the United States, which said course of business is not prohibited by said Chapter 390 (R. 28). There are also a number of manufacturers and wholesalers of intoxicating liquors who are engaged in importing into the State of Minnesota from other states intoxicating liquors containing more than twenty-five per cent of alcohol by volume under brand names that have been registered in the patent office of the United States, which said course of business is not prohibited by said Chapter 390 (R. 28). In many instances the intoxicating liquors manufactured by appellee, the brand names of which are not registered in the patent office of the United States, are identical in kind, ingredients and quality with intoxicating liquors the brand names of which are registered in the patent office of the United States, and which intoxicating liquors are legally being imported into the State of Minnesota (R. 28). The registration of brand names in the patent office of the United States is not dependent upon the

kind, ingredients or quality of the intoxicating liquor to which the brand is affixed (R. 28).

Laws of Minnesota for 1935, Chapter 390, provides that:

> "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States." (R. 25, 26).

The matter was heard in the United States District Court, District of Minnesota, Fourth Division, before a regularly constituted three-judge court organized under the provisions of Section 380 of the United States Code Annotated upon the petition of appellee for a permanent injunction. The lower court decided that the statute was unconstitutional as violative of the equal protection clause of the Constitution of the United States and granted, first an interlocutory injunction, and then a permanent injunction against the enforcement thereof.

This appeal is taken from the final decree and judgment.

SPECIFICATION OF ERRORS TO BE URGED.

The District Court of the United States, for the District of Minnesota, Fourth Division; and the special three-judge court organized and sitting therein, erred:

I.

In determining as a conclusion of law that the plaintiff was entitled to the decree of the court adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935 is in all things unconstitutional and void.

II.

In determining as a conclusion of law that the plaintiff was entitled to the decree of the court

(a) Enjoining and restraining the defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(b) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

III.

In rendering and entering its final decree

(a) Adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935, to be, in all things, unconstitutional and void;

(b) Enjoining and restraining the defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

(d) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

IV.

In its failure to hold that Chapter 390 of the Laws of Minnesota of 1935 was constitutional.

V.

In its failure to dismiss the plaintiff's bill of complaint.

SUMMARY OF ARGUMENT.

I.

COMMERCE CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the commerce clause, Art. I, Sec. 8, Clause 3, of the Constitution of the United States.

Appellants contend that since the enactment of the Twenty-first Amendment the commerce clause does not apply to intoxicating liquors when shipments thereof are made into a state for use or for delivery in such state, and when such shipments are contrary to a law or regulation of the state. If such shipments of intoxicating liquors were merely being transported across or through such state, the commerce clause would still protect them from interference on the part of the state; and if the shipments of intoxicating liquors into a state does not conflict with any of the laws of the state, or if the state has made no laws pertaining to the importation of intoxicating liquors, such shipments would then remain within the protection of the commerce clause.

II.

EQUAL PROTECTION CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the equal protection clause, Article XIV, Section 1, of the Constitution of the United States, because such law is not unreasonably and arbitrarily discriminatory, and because the application and protection of such clause has been removed from the importa-

tion of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

III.

FREEDOM OF CONTRACT CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the freedom of contract clause, Art. I, Sec. 10, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

IV.

DUE PROCESS CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention with the due process clause, Art. XIV, Sec. 1, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

ARGUMENT.

The constitutionality of Laws of Minnesota for 1935, Chapter 390, was attacked by the appellee in the court below upon the grounds that said law violated (1) the commerce clause, Art. I, Sec. 8, Clause 3, (2) the equal protection clause, Art. XIV, Sec. 1, (3) the freedom of contract clause, Art. I, Sec. 10 and (4) the due process clause, Art. XIV, Sec. 1.

In its conclusions of law, the lower court determined that Chapter 390 was in all things unconstitutional and void (R. 30). In its opinion, the court reached the conclusion that Chapter 390 was unconstitutional as denying the appellee the equal protection of the laws (R. 16-21). While the lower court confined itself only to the one specification of unconstitutionality, the other grounds are raised by appellee in its Bill in Equity, and for that reason we deem it necessary to discuss each point raised by appellee.

I.

COMMERCE CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the commerce clause, Article I, Section 8, Clause 3 of the Constitution of the United States, because the application and protection of such clause has been removed from intoxicating liquors by legislation culminating in the Twenty-first Amendment to the Constitution of the United States.

STATEMENT OF APPELLANTS' CONTENTION.

The commerce clause, Article I, Section 8, Clause 3, provides:

> "The Congress shall have power to * * * regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Appellants' position is that since the enactment of the Twenty-first Amendment to the Constitution of the United States the commerce clause does not apply to intoxicating liquors when shipments thereof are made into a state for use or for delivery in such state, and when such shipments are contrary to a law or regulation of the state. If such shipments of intoxicating liquors were merely being transported across or through such state, the commerce clause would still protect them from interference on the part of the state; and if the shipments of intoxicating liquors into a state did not conflict with any of the laws of the state, or if the state had made no laws pertaining to the importation of intoxicating liquors, such shipments would then remain within the protection of the commerce clause.

CONSTITUTIONAL AND LEGISLATIVE DEVELOPMENT.

The primary point to be determined is the right of a state to control and to deal with its own intoxicating liquor problems and, in connection therewith, to prohibit or regulate the importation of intoxicating liquors totally free from any restrictions of the commerce clause of the Constitution of the United States. It must be conceded that by the commerce clause of the constitution, Congress was given complete and exclusive power and authority to regulate the commerce between the several states. It is for us to consider

and determine how far Congress has waived its power in favor of the states, and to what extent such power has been abridged by subsequent constitutional amendments in so far as intoxicating liquors are concerned. To accomplish this purpose it is well to trace the development of the decisions of this court and also the history of federal legislation leading up to the passage of the Twenty-first Amendment, which amendment grants to the states full freedom to regulate the importation of intoxicating liquors therein.

The Commerce Clause.

In The License Cases, 46 U. S. 504, arising early in the history of our national government, the Supreme Court of the United States rendered its opinion on statutes of Massachusetts, New Hampshire and Rhode Island involving importations of wines from a foreign country, and also upon a New Hampshire statute relative to gin imported from the State of Massachusetts. The court, speaking through Chief Justice Taney, took the position that while a shipment of intoxicating liquor came within the purview of the commerce clause of the constitution and would, therefore, ordinarily be under the control of the Federal Government, nevertheless, when Congress had not acted and had not assumed any control over the matter, it then remained within the power of the state, in the exercise of its police power, to control the sale of such intoxicating liquor. In sustaining the license laws of the states referred to, the Chief Justice, at page 585, said:

> "* * * as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the pol-

> icy which the State may suppose to be its interest or duty to pursue."

The court further held that where Congress has acted

> "* * * although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorized to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or lessen the revenue of the general government."

and that there is nothing in the Constitution of the United States

> "to prevent it (a state) from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

The decision in the License Cases remained the law of this country for forty years. During that period more and more states adopted similar measures for exercising control of the intoxicating liquor traffic and limiting the shipments of intoxicating liquor into the state, and the system of such local state control became widespread.

From the time of the License Cases, supra, to the decision in the Bowman case, hereinafter discussed, the court did not seriously interfere with the full control of intoxicating liquor by the states. Between the License Cases and the Bowman case we find the case of Walling v. Michigan, 116 U. S. 446. In this case, the court, in passing upon a statute imposing a license tax upon persons soliciting or taking orders from citizens or residents of Michigan for intoxicating liquors to be shipped into that state, and in holding that such statute

was unconstitutional in that it violated the Commerce Clause of the Constitution of the United States, said, at page 458:

> "* * * we have no hesitation in saying that the act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax to that which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States."

It is apparent that the court did not base its decision in the Walling case as much on the fact that interstate commerce was impeded as it did on the fact that there was discrimination between local products and the products imported into the state. If the Michigan law had required every solicitor to obtain a license whether for the sale of intoxicating liquors produced in Michigan, or for intoxicating liquors imported therein, the court indicates that the statute under consideration would not have been repugnant to the commerce clause.

Original Package Doctrine.

A different view was taken by the court in the cases of Bowman v. Chicago, etc., Railway Company, 125 U. S. 507 and Leisy v. Hardin, 135 U. S. 100, which cases involved instances where Congress had not acted. In these cases the national character of the transportation of intoxicating liquors in interstate commerce was stressed and it was held that in the absence of any law of Congress granting the right to a state to impose restrictions commerce should be free and unhindered. These two cases involve the shipment of intoxicating liquors in original packages in interstate commerce and develop the original package doctrine. In

1886 the State of Iowa enacted a law forbidding common carriers to bring intoxicating liquors into that state unless they were first furnished with a certificate that the consignee thereof was authorized to sell said liquors. Such law would have been valid under the decision in the License Cases because Congress had never legislated upon the subject and Iowa was simply exercising the police power which had been allowed to the states involved in the License Cases under the decision of Chief Justice Taney. But when this statute came before the court in the Bowman case, the court directly repudiated the doctrine enunciated by Chief Justice Taney in the License Cases and substituted the doctrine, as expressed by Chief Justice Field, at page 507, that

> "* * * where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted."

Very shortly after the decision in the Bowman case another prohibition statute of Iowa came before the court in the Leisy case, supra. In the Leisy case the plaintiff invoked the protection of the commerce clause in asserting that the Iowa law authorizing the seizure of intoxicating liquors in original packages shipped in interstate commerce was void. The rule stated in the Bowman case was approved of by the court in the following words, page 108:

> "And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action."

The rule set forth in the Bowman case was further extended in the Leisy case to afford the protection of the commerce clause to the sale of imported liquor, the court saying, at page 124:

> "Under our decision in Bowman v. Chicago, etc., Railway Co., supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

The court points out when such shipments lose their interstate character and become subject to the law of the state.

Wilson Act.

By the use of the words "In the absence of congressional permission to do so" the court expressly pointed out that the right of local control to suppress or control the unrestricted flow of intoxicating liquors which the states desired, should be sought from Congress, and with Chief Justice Fuller's decision in the Leisy case freshly in mind, Congress lost no time in endeavoring to take advantage of the court's suggestion. As a result the so-called Wilson Bill was introduced

on December 4, 1889. As originally introduced this bill unreservedly granted to the states complete power to prohibit, regulate, control, and otherwise govern the transportation of intoxicating liquors into such states from beyond their respective boundaries wholly free from any limitations of the commerce clause, the said bill reading as follows:

> "That no state shall be held to be limited or restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or the transportation as an article of commerce or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors by reason of the fact that the same have been imported into such State from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, impost, or excise to the United States." Vol. 21, Cong. Rec., p. 534.

When this Bill was introduced objection was promptly made by Senator Hiscock on the grounds that said bill

> "May be invoked by the legislature of a State, not for that purpose but for a purpose of protecting the industries, the distillers, of their own State, the brewers of their own State, the wine-makers of their own State, against those of others * * *." Vol. 21, Cong. Rec., p. 5090.

Senator Hoar, a great constitutional lawyer, replied to this objection (Vol. 21, Cong. Rec., pp. 5090-5091) as follows:

> "The senator says that he finds the vice in this bill, that it will leave the States of the Union free to undertake to regulate or control the traffic in intoxicating liquors for the purpose of protecting their own industries against the competition of other States or other nations."

and then proposed the following amendment:

> "Provided that such prohibition, regulation, control,

or tax, shall apply equally to all articles of the same character wherever produced."

Senator Graves (Vol. 21, Cong. Rec., p. 5336), Senator Falkner (Vol. 21, Cong. Rec., p. 5378), and Senator Edmonds (Vol. 21, Cong. Rec., p. 5378), proposed numerous amendments to the bill in different language but to the same effect, of limiting the power of the state in the regulation made, so that they would be the same as "affecting or applicable to all other like property." Senator Wilson also proposed an amendment to prevent such discrimination. (Vol. 21, Cong. Rec. p. 5324). It will be noted that the objections made to the Wilson Bill in its original form were practically the same that the court made in the Walling case, supra, and that the remedy suggested by Senator Hoar follows the suggestion made by the court in the Walling case. In order to prevent the discrimination referred to the bill in its final form contained express provisions against discrimination and read as follows:

> "All fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The effect of the Wilson Act has been the subject of many outstanding decisions in which it has been firmly established that under the provisions of said act, the protection of the commerce clause of the Constitution of the United States

was removed from intoxicating liquors as soon as delivery was made by the carrier to the consignee, and that thereafter such intoxicating liquors came under all of the regulations of the state, provided, however, that such state could not discriminate against such imported intoxicating liquors in any way, but must treat them in the same manner as intoxicating liquors produced within the state.

Decisions under Wilson Act.

In re Rahrer, 140 U. S. 545,
Scott v. Donald, 165 U. S. 58,
Vance v. Vandercook Co., 170 U. S. 438,
Reymann Brewing Co. v. Brister, 179 U. S. 445,
Rhodes v. Iowa, 170 U. S. 412,
American Express Company v. Iowa, 196 U. S. 133,
Pabst Brewing Company v. Crenshaw, 198 U. S. 17,
Delameter v. South Dakota, 205 U. S. 93,
Phillips v. City of Mobile, 208 U. S. 472,
Adams Express Co. v. Kentucky, 214 U. S. 218,
L. & N. R. R. Co. v. Cook Brewing Co., 223 U. S. 70,
De Bary & Co. v. Louisiana, 227 U. S. 108.

Effect of Wilson Act.

We now come to the second group of statutes and cases. It will be noted that the first group limited the freedom of the states by express language against discrimination against out-of-state products. Besides the Wilson Act dealing with intoxicating liquors, we find the Lacey Act relating to the transportation of dead game—Act of Congress, May 25, 1930, C. 533, 31 Stat. 187; Hawes-Cooper Act, 1929, 45 Stat. 1084; Original Oleomargarine Statute, Act of Congress, May 9, 1902, C. 784, Par. 1, 32 Stat. 193. Each of these acts pro-

vides that the article controlled shall be subject to state control "to the same extent and in the same manner" as though the article were produced in the state, thus evidencing the intent on the part of Congress to restrict the freedom of the states to make any discrimination. The effect of the Wilson Act was to remove the protection of the commerce clause of the federal constitution from intoxicating liquors as soon as delivery was made to the consignee. Thereafter such intoxicating liquors came under all of the regulations of the state, provided, however, that the state could not discriminate against such importations in any way, but must treat them in the same manner as all other intoxicating liquors within the state.

The above cited decisions interpreting the Wilson Act disclosed that said Act did not completely prohibit the importation of intoxicating liquors, and unscrupulous persons were afforded an opportunity to evade local liquor regulations. As a result Congress again turned its attention to the problem and enacted the second group of statutes which we will discuss.

Acts Subsequent to Wilson Act.

Group two includes Section 242 of the Criminal Code of March 4, 1909, the Webb-Kenyon Act of 1913, the Reed Amendment of March 3, 1917, and the Collier Act of 1933. This type of legislation is similar to the first group of acts in that it forbids the importation or transportation of certain articles contrary to the laws of the state. However, in these later statutes there is no limitation upon the power of the state to prevent the state from discriminatory action or from dealing with importations as such as distinct from purely intrastate regulations.

Webb-Kenyon Act.

The Webb-Kenyon Act, Senate Bill 4043, as reported out by the Senate Committee, contained a second section in exactly the same wording as the Wilson Act, prohibiting any discrimination by the state and subjecting the imported intoxicating liquors to the control of the state:

> "To the same extent and in the same manner as though such liquids or liquors had been produced in such state or Territory." Vol. 49, Cong. Rec., p. 2687.

After an extended debate in Congress upon the question of retaining or striking out this second section 7 and thus prohibiting discrimination by the state, or permitting it, Congress decided to give the state complete self-control of its problems relative to intoxicating liquors and the right to discriminate if it chose to so do. by completely eliminating the second section, and the act was passed in its present form.

The history of the Wilson Act and of the Webb-Kenyon Act affords a striking contrast. The Wilson Act, as originally introduced, contained no clause or reservation preventing discrimination against imported intoxicating liquors, but was amended so as to expressly include such prohibition against discrimination. On the contrary, the Webb-Kenyon Act began its legislative career with all of the prohibitions against discrimination contained in the Wilson Act, but such prohibitions were rejected by Congress, and the Act finally enacted, without such prohibition, even in the face of a presidential veto emphasizing that very point. The elimination of this restriction definitely shows that it was the intent and purpose of Congress to leave the states free to discriminate if they so desired. This intent and pur-

pose is further shown by the arguments of the members of Congress relative to the particular restriction. At page 702 of Vol. 49 of the Congressional Record we find the following remarks made by Senator William E. Borah:

> "The prohibition which has been made in the preceding section is, in a sense, abrogated in the second, and liquor is recognized as an article of commerce. Recognizing it as an article of commerce, and one which may go into the state, then the question is, can you stop it and turn it over to the state before it is finally delivered to the consignee? In the first section you make it a contraband of commerce when it is being shipped for unlawful use. In the second you recognize it as an article of commerce, but turn it over to the state before it is delivered to the consignee. I do not think this aids the law in its efficiency, and I believe it is unconstitutional."

In speaking of the effect of the restriction as contained in the original draft, Senator Kenyon, one of the authors of the act, said:

> "The first section takes certain liquor out of commerce, and the second section seems to recognize it as being in. There is some incongruity in this." Vol. 49, Cong. Rec., p. 830.

When this act was presented to President Taft for his signature, the President pointed out that the effect of the act was:

> "to permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors." Vol. 49, Cong. Rec., p. 4292.

and vetoed it. In his veto message, Vol. 49, Cong. Rec., p. 4296, President Taft quotes from the opinion of Attorney General Wickersham as follows:

> "The proposition * * * can only be conceded if it be held that Congress can abdicate entirely its power over interstate commerce in an article which it does not itself declare to be 'an outlaw of commerce,' but which it leaves to the varying legislation of the respective states to more or less endow with qualities of outlawry. Without prolonging this discussion * * * I am compelled to the conclusion that unless the Supreme Court shall recede from a well-settled line of decisions extending over a long period of years it would most certainly declare this legislation to be without the constitutional powers of Congress."

The Act was, however, declared to be constitutional in the case of James Clark Distilling Company v. Western Maryland Railway Co., 242 U. S. 320.

Decisions Under Webb-Kenyon Act.

The Webb-Kenyon Act is the congressional prototype of the Twenty-first Amendment, and the decisions of the courts in construing and applying it are particularly apt in the present case. Probably the leading and most widely cited of these cases is that of

CLARK DISTILLING COMPANY v. WESTERN MARYLAND RAILWAY CO., 242 U. S. 320.

This case involved an action brought by the plaintiff to compel the defendant to accept shipments of intoxicating liquor destined for the State of West Virginia. The statutes of West Virginia prohibited the manufacture, sale, keeping or storing for sale of intoxicating liquor except by druggists for medicinal, sacramental, scientific, and manufacturing purposes; but there was no express prohibition against the individual right to use intoxicants. The statute further

provided that every delivery of intoxicating liquor in the state by a common carrier should be considered as a consummation of a sale made at the point of delivery in the state. After stating that there can be no question that this statute did not offend the due process clause of the Fourteenth Amendment, the court, at page 320, said:

> "But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has not been open to question since the decision in Leisy v. Hardin, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, * * *."

Replying to the contention that the Webb-Kenyon Act was only intended to include state prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use, the court, at page 323, stated:

> "The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future state laws forbade sales of intoxicants. * * * At the same

time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensory system prevailed. Vance v. Vandercook Company, 170 U. S. 438 Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the State law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable.".

In passing upon the case of Adams Express Co. v. Kentucky, 238 U. S. 190, an earlier decision interpreting the Webb-Kenyon Act, the court said, at page 325:

"But we see no grounds for following the rulings thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate

commerce away from all receipt and possession of liquor prohibited by state law."

SEABOARD AIRLINE RY. v. NORTH CAROLINA, 245 U. S. 298.

This case reiterates the language of the Clark case. An act of North Carolina required railroad companies to keep a separate book in which the name of every person to whom intoxicating liquor was shipped was to be entered. The statute further provided that the record was to be open for inspection by any officer or citizen. This statute did not prohibit, but did restrict, the use of and traffic in intoxicating liquors. The railroad company was prosecuted for an alleged violation of the act. It defended on the grounds that it could not comply with the statutes without violating the commerce clause of the constitution. The court held that a shipment from without the state was not free from this restriction because of the commerce clause, as the Webb-Kenyon Act had removed that protection.

McCORMICK & CO. v. BROWN, 286 U. S. 131.

In this case, decided in 1932, the court held that the Webb-Kenyon Act was still in force despite the Eighteenth Amendment and the National Prohibition Act. In this case, the court sustained a West Virginia statute restricting, but not prohibiting, the liquor traffic, and requiring nonresidents to take out a permit at an annual fee of fifty dollars before selling or furnishing any intoxicating liquor to any place in the state. If any doubt remained as to the extent of the application of the Webb-Kenyon Act in removing the protection of the commerce clause from interstate intoxicating liquor shipments, it was removed by the opinion of the court in this case. At page 143, the court said:

"The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the State into which the shipment is made * * *. The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their products only to licensed dealers in West Virginia, * * *.

The short answer is that the state law does not make permits issued to local dealers a substitute for the permits required of wholesale dealers. If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the state law within the meaning of the Webb-Kenyon Act."

Eighteenth Amendment.

We next come to the Eighteenth Amendment to the Constitution of the United States and cases thereunder. The amendment reads as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

Under this amendment the individual states retained their own power and their authority was not confined to intrastate commerce only.

Decisions Under Eighteenth Amendment.

NATIONAL PROHIBITION CASES, 253 U. S. 350.

In passing upon the meaning of Section 2 of the Eighteenth Amendment the court stated, at page 387:

> "The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."

UNITED STATES v. LANZA, 260 U. S. 377.

This case involved the prosecution of a liquor law of the United States. The defendant pleaded a former conviction under the liquor laws of the State of Washington. The court held that the Eighteenth Amendment freed the individual states from all restrictions upon the state's powers placed thereupon by the federal constitution, in the following words by Chief Justice Taft, who, it will be recalled, vetoed the Webb-Kenyon Act when he was President, at page 381:

> "In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. * * * Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the

ratio decidendi of our decision in Vigliotti v. Pennsylvania, 258 U. S. 403."

This decision was quoted with approval in McCormick & Company, Inc. et al. v. Brown, Commissioner, et al., 286 U. S. 131. In Corneli v. Moore, 257 U. S. 491, the court refused to uphold the contention that the power of Congress under the Eighteenth Amendment was restricted by the Fifth Amendment.

Collier Act.

In 1933, Congress passed what is known as the Collier Act, (Act of Congress of March 22, 1933, c. 4, 48 Stat. 17, 27 U. S. C. A., Sec. 64 j) which act specifically divested beer, ale, porter, wine, similar fermented malt or vinous liquor and fruit juice containing 3.2 per cent or less of alcohol by weight of their interstate character in certain cases and prohibited their shipment or transportation in violation of state law.

Twenty-first Amendment.

Such was the condition of the law immediately previous to the adoption of the Twenty-first Amendment to the Constitution of the United States. That amendment effectually restores to the states the same power with respect to the transportation and importation of intoxicating liquors which they enjoyed prior to the constitution. In other words the Twenty-first Amendment, in so far as intoxicating liquors are concerned, abrogated the commerce clause of the constitution of the United States and, as was said by Chief Justice Taft in the Lanza case, the states may now act in pursuance of the guaranty of the Tenth Amendment which amendment states that:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The purport of this amendment is expressed by the Supreme Court in Gordon v. United States, 117 U. S. 697 in the following words, at page 705:

> "The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument."

We also find the following statement in Buffington v. Day, 11 Wall. (U. S.) 113:

> "In respect to the reserved powers, the state is as sovereign and independent as the general government."

Prior to the adoption of the Federal Constitution the states were sovereign in the full absolute sense of the term and repeatedly enacted laws controlling, regulating and prohibiting importations. Spooner v. McConnell, 22 Fed. Cas. No. 13, 245; Ex parte Guerra, 94 Vt. 1, 110 Atl. 224; American Coal Min. Co. v. Indiana Special Coal. etc. Com., 268 Fed. 563, 258 U. S. 632; Thurlon v. Massachusetts, 5 How. (U. S.) 504-587.

The proposal to repeal the Eighteenth Amendment, terminating in the adoption of the Twenty-first Amendment to the federal constitution, as originally proposed in Senate Joint Resolution 211 in December, 1932, contained a specific proposal to remove the protection of the interstate commerce clause from intoxicating liquors only when the same was transported or imported into a state prohibiting the same. The proposal read:

"Section 1. The provisions of clause 3 of Section 8 of Article I of the Constitution * * * shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any state * * * for use therein of intoxicating liquors for beverage or other purposes within the state or territory if the laws in force therein prohibit such transportation or importation; * * *." (Vol. 76, Cong. Rec., p. 65).

On January 9, 1933, the Senate Judiciary Committee presented its report on this Resolution, and recommended as a complete substitute therefor the Amendment in its present form, with the addition of an added section, which section was subsequently removed. (Vol. 76, Cong. Rec., p. 1621). In discussing the recommendation of the Judiciary Committee, Senator Blaine, who was representing the Committee, stated:

"First, however, we had what is known as the Wilson Law. That law was treated in the case of Rhodes v. Iowa, 170 U. S. 412; but the Supreme Court in that case gave rather a restricted construction of the language used by Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actully been delivered to the consignee * * *

"The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of Clark Distilling Company v. Western Maryland Railway, 242 U. S. 311. The language of the Webb-Kenyon Act was designed to give the states in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the state; and the Supreme Court held that it was following the doctrine laid down in the case of Rhodes v. Iowa, and necessarily must follow that doctrine in order to sustain the decision it was

making in the case of Clark against Maryland Railroad Company * * *.

"In the case of Clark against Maryland Railway Company there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line" (Vol. 76, Cong. Rec. pp. 4140-4141).

Again referring to the second section of the Amendment, Senator Blaine said:

"* * * The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States * * *."

Senator Borah, a recognized authority on constitutional law, speaking on the proposed amendment before the Senate, stated:

"Mr. President, I wanted to say that this question of the right of the States, in the exercise of the police powers to control the liquor traffic within the States, was fairly and squarely presented in many cases to the Supreme Court, always a portion of the court contending that the police power should be permitted to be exercised by the States to the full extent within the boundaries of the States. * * * The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for State's rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local

self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment." (Vol. 76, Cong. Rec., p. 4172).

In order that there might be no question but that the protection to be afforded by Congress in the removal of the interstate commerce provision should be extended only to the dry states, Senator Glass offered as an amendment a substitute containing the following language:

"The sale of intoxicating liquors within the United States * * * for consumption at the place of sale, and the transportation of intoxicating liquors into any State * * * in which the manufacture, sale, and transportation of intoxicating liquors are prohibited by law, are hereby prohibited * * *." (Vol. 76, Cong. Rec., p. 4211).

In explaining his amendment, Senator Glass said (p. 4219):

"* * * In my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry state. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution * * * prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; * * *."

The amendment was defeated.

It can readily be seen that Congress had squarely before it the question of whether or not the proposed amendment should remove the protection of interstate commerce from

the shipment of liquors into all States contrary to their laws, or simply into States which are dry. That there was no question in the mind of Congress as to the meaning of the provision is shown by the language of Senator Robinson as follows:

> "The language of section 2 is perfectly plain. * * * That leaves to the State the power of regulation; it places the moral force of the government of the United States behind the State in the enforcement of their laws; * * *" (Vol. 76, Cong. Rec., p. 4225).

In the House of Representatives, Representative McSwain (p. 4522) stated:

> "The proposed amendment to the Constitution is, in effect, a proposal to repeal the Eighteenth Amendment, but also to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever."

Section 2 of the Twenty-first Amendment as finally proposed by Congress to the States on February 20, 1933, and as ratified by the required number of states and in force December 5, 1933, was in the exact language as reported out by the Senate Judiciary Committee and reads:

> "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Decisions Under Twenty-first Amendment.

The extent to which the Twenty-first Amendment has removed intoxicating liquors from the protection of the commerce clause has been passed on by a number of district courts and by this court.

PREMIER-PABST SALES CORPORATION v. GROSSCUP, 12 Fed. Supp. 970.

In this case, the District Court for the Eastern District of Pennsylvania had under consideration a statute of that state which discriminated between distributors of beer made within the state and distributors of imported beer. Plaintiff raised the objections that the statute was in violation of 1. The commerce clause of the Constitution of the United States, and 2. The Fourteenth Amendment to the Constitution of the United States. After briefly discussing the various laws and decisions leading up to and including the Twenty-first Amendment, the court states, at pages 971, 972:

> "As the law now is, the measure of control which the states may exercise is determined by the states themselves. If the importation of intoxicating liquor is acceptable to a state, it retains its status as the legitimate subject of interstate commerce, but if it is forbidden importation by the state, the laws of the United States likewise forbid it. Interstate commerce is spoken of under the figure of a stream whose free flow cannot be interrupted by any state law. Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United States forbids its further importation if in violation of the laws of the state."

Restating itself, the court, at page 972, further says:

> "Under the Twenty-first Amendment when a state passes a law upon the subject of the importation of intoxicating liquors all importation in violation of that law is forbidden by the Constitution and laws of the United States."

The decision of the lower court was appealed to the Supreme Court where it was affirmed, 298 U. S. 226, but that

court refused to pass on the constitutional questions involved, and based its affirmance upon the fact "that the plaintiff is without standing to present it" (p. 227).

GENERAL SALES & LIQUOR CO. v. BECKER, 14 Fed. Supp. 348.

The Liquor Control Act of Missouri, Laws of Missouri 1935, p. 273, provided that a nonresident could not lawfully solicit, receive or take orders for the sale of intoxicating liquors in the State of Missouri except by or through a duly licensed wholesale liquor dealer. The statute further provided that no intoxicating liquors could be imported into the state for sale or storage therein unless ordered by a licensed wholesale dealer. The act also provided that a nonresident must pay the same annual license fee as a resident wholesale dealer. Plaintiff was a nonresident dealer in intoxicating liquors holding a Missouri license. The contention was made by plaintiff that to require it to pay the same license fee as a resident wholesale dealer and then to prohibit it from selling to a retail dealer on the same basis as a resident wholesale dealer placed a burden on interstate commerce and deprived plaintiff of the equal protection of the law. After discussing the Webb-Kenyon Act and the Twenty-first Amendment relative to the commerce clause, the court said, at page 350:

> "The amendment does recognize the authority of the state to regulate the movement of liquor into the state, and where availed of, as in this case, the importation of intoxicating liquors in violation of local law is outside the commerce clause."

PACIFIC FRUIT & PRODUCE CO. v. MARTIN, 16 Fed. Supp. 34.

In this case the District Court of Washington had under

its consideration a Washington statute which required a non-resident wholesale dealer in intoxicating liquors to obtain a license to sell beer in the state. The court held that such requirement violated the commerce clause, the equal protection clause and the due process clause of the Constitution of the United States. The court followed the opinions of the courts in Joseph Triner Corporation v. Arundel, 11 Fed. Supp. 145, the present case now on appeal, and Young's Market Co. v. State Board of Equalization, 12 Fed. Supp. 140, which case was reversed on appeal, State Board of Equalization of California v. Young's Market Co., 299 U. S. 59. The court stated its interpretation of the law in the following language, at pages 39, 40:

> "While it may be conceded that the intent of the Wilson Act, 26 Stat. 313 (27 U. S. C. A., Sec. 121), the Webb-Kenyon Act, 37 Stat. 699, 49 Stat. 877 (27 U. S. C. A., Sec. 122), the Act of March 22, 1933, 48 Stat. 19, Sec. 6, referred to in defendants' brief as the 'Collier Act,' repealed and in part renacted, 49 Stat. 877, Sec. 202, subdivision (a), and subdivision (b), 27 U. S. C. A., Sec. 122, and the Twenty-first Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over intoxicating liquors produced in the state into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another."

The doctrine of this case has been repudiated by subsequent decisions hereinafter set forth.

DUGAN v. BRIDGES, 16 Fed. Supp. 694.

A statute of New Hampshire, Laws of 1933, Chapter 99, as amended by Laws of 1935, Chapter 152, provided that no

wholesaler of intoxicating liquors could purchase any beverages from any manufacturers who did not have a permit as required by law, and import such beverages into New Hampshire for the purpose of sale, unless the manufacturer from whom the purchase was made had obtained a certificate of approval from the New Hampshire State Liquor Commission, the certificate costing five hundred dollars annually. The court discusses in great detail the history of the development of legislation leading up to the Twenty-first Amendment. The court stated, at page 705, after reviewing the Webb-Kenyon Act:

> "In view of the legislation above mentioned, it cannot be claimed that the New Hampshire act of which complaint is made imposes an undue burden upon interstate commerce and for that reason is unconstitutional."

The court later discusses the Twenty-first Amendment, and after quoting Section 2 thereof says, at page 706:

> "There seems to have been no authoritative ruling by the Supreme Court as to the effect of section 2 of the section above quoted. Its language so closely follows the Webb-Kenyon Act as to lead us to the conclusion that it was copied therefrom and that it should receive the same construction as that given the last-mentioned act."

PHILIP BLUM & CO. v. HENRY (Wisc. March 28, 1936).

This case apparently has not been reported.

A Wisconsin statute required non-resident dealers in intoxicating liquors to pay an annual license fee to sell such liquors in that state. Sales by non-resident dealers were limited to manufacturers or wholesalers. For the same license fee, residents of Wisconsin were permitted to sell to retailers as well as to manufacturing and wholesalers. The

Wisconsin statute, it will be noted, was very similar to the Missouri statute above referred to.

The District Court for the Eastern District of Wisconsin, after discussing the intent of the Twenty-first Amendment, stated:

> "The query is at once prompted, can it be possible that the language of the Amendment may be so ignored that Congress may still regulate interstate commerce—in intoxicating liquor,—by authorizing transportation into any state, notwithstanding interdiction by the state? Or that it must be held, notwithstanding the amendment, that the right to transport intoxicating liquors into any state is guaranteed by other articles of the National Constitution as a 'privilege or immunity,' of a citizen of the United States; or to 'citizens of the several states; or as a guaranteed protection of equal laws? We regard these contentions as repugnant to the plain words of the articles."

STATE BOARD OF EQUALIZATION OF CALIFORNIA v. YOUNG'S MARKET CO., 299 U. S. 59.

This case is the first and, at the time of writing this brief, the only decision by this court interpreting the Twenty-first Amendment. The statute of California imposed a license fee of five hundred dollars for the privilege of importing beer to any place within the borders of the state, but did not grant the right of selling the beer so imported within the state. In discussing the contention of the plaintiffs that the requirement of a license fee for the importation of beer violates the commerce clause, the court said, at page 62:

> "What the plaintiffs complain of is the refusal to let them import beer without paying for the privilege of importation. Prior to the Twenty-first Amendment it

would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. * * *

"The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions it prescribes."

WYLIE ET AL v. STATE BOARD OF EQUALIZATION et al., 21 Fed. Supp. 604.

This case involved a California statute prohibiting the importation of intoxicating liquors into that state without first having obtained an importer's license. One of the grounds of attack was that the statute violated the commerce clause. In answer to this contention, the court stated, at page 605:

"The power of the states to control the traffic in liquor, under the Twenty-first Amendment, has been but recently declared to be absolute, in a case arising in California. There the Supreme Court held that the power is not limited by the commerce clause of the Constitution. (State Board of Equalization v. Young's Market Company (1936) 299 U. S. 59)."

ZUKAITIS v. FITZGERALD, 18 Fed. Supp. 1000.

In this case plaintiffs attacked the validity of a section of the Michigan Liquor Control Act, Public Acts Mich. 1933, Ex. Sess., No. 8, Sec. 40, in so far as it provided for an inspection fee of twenty-five cents a barrel to be paid by nonresident manufacturers of beer; and of the rules and regu-

lations of the Michigan Liquor Control Commission requiring 1. That all non-resident breweries obtain a seller's contract, and 2. That wholesale distributors of beer should be limited to handling the products of not more than two resident breweries, and not more than one non-resident brewery.

After discussing plaintiffs' objections and defendants' arguments, the court stated, at page 1004:

> "It is apparent that the statute and regulations complained of impose discriminatory burdens upon out-state liquor, but we are not convinced that such discriminations are so wholly unrelated to the powers now returned to the states by the Twenty-first Amendment to regulate or forbid the importation of liquors into Michigan that we can say with that clearness which is imperative that such rules and regulations are unconstitutional. This view is confirmed by the decision of the United States Supreme Court, in the case of State Board of Equalization of California et al. v. Young's Market Company et al. (November 9, 1936) 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. ..... In that case, a construction was placed upon the Twenty-first Amendment which clearly recognized the right of the states to forbid entirely transportation and importation of liquor, to impose heavy importation fees and to exact importer's license fees. The Supreme Court in that case refused to construe the amendment in such manner as to limit these rights to those states which prohibit manufacture and sale of liquor within their borders."

FINCH & CO. v. McKITTRICK, Mo. Feb. 24, 1938.

This case was heard by the United States District Court for Missouri and has not been reported.

A Missouri statute, Laws of 1937, H. B. No. 331, prohibited the sale within the State of Missouri of intoxicating liquors manufactured in such other states as have laws dis-

criminating against intoxicating liquors manufactured in Missouri. The plaintiffs raised the objection that said law violated both the Commerce Clause and the Equal Protection Clause of the Constitution.

After discussing the case of State Board of Equalization of California v. Young's Market Co., supra, the District Court said:

> "By reason of this opinion it must now be said that the implied prohibition upon state legislation arising from the 'commerce clause' no longer exists, in so far as intoxicating liquors are concerned. So far as that one commodity is concerned the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution."

The court held that the commerce clause was not violated.

II.

EQUAL PROTECTION CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the equal protection clause, Article XIV, Section 1, of the Constitution of the United States, because such law is not unreasonably and arbitrarily discriminatory, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

A. Chapter 390 is not unreasonably and arbitrarily discriminatory.

General principles of equal protection clause.

Article XIV, Section 1 of the Constitution of the United States provides that no state shall:

> "deny to any person within its jurisdiction the equal protection of the law."

This constitutional provision is not violated if "the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Duncan v. Missouri, 152 U. S. 377. The following statement is found in Black on Constitutional law (4th Ed.) page 567:

> "The 'equal protection of the laws' means the protection of equal laws, and requires every state to give equal protection and security to all under like circumstances, the object being to prevent arbitrary and invidious discriminations and class legislation not founded on legal and reasonable grounds of distinction."

Legislation objectionable as being in violation of the equal protection clause is that which makes improper distinctions and discriminations by conferring privileges on a class arbitrarily selected from large numbers of persons who stand in the same relation to the privilege in question, there being no substantial reason for making such distinction. Where the statute applies equally and alike upon those actually or properly within the same class, the statute cannot be called class legislation. Missouri Railway Co. v. Mackey, 127 U. S. 205.

A more complete statement of the purposes and limitations of the equal protection clause is found in the case of Barbier v. Connolly, 113 U. S. 28. That case involved a

municipal ordinance prohibiting washing and ironing in public laundries and wash-houses within certain territorial limits between certain hours. The court, at page 31, said:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, * * *. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed ts police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. * * * Class legislation, discrimination against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Scope of Police Power.

The equal protection clause does not prevent the state from making classification under its police powers, but permits wide discretion in that regard. It is only those laws

that are without reasonable basis and purely arbitrary that violate such clause.

The earlier decisions of this court quite generally limited the exercise by the state of its police powers to matters affecting the public health, public morals and public safety, but during the past half century this limitation has been abandoned and the court has enlarged by judicial interpretation the scope of this power to meet the requirements of changing economic and industrial conditions. It is now the consensus of judicial opinion that the state may exercise its police power not only for the promotion and protection of the public health, public morals and public safety, but also to promote the wealth and prosperity, the comfort, convenience, and happiness, in short, the general welfare of the people of the state.

Black on Constitutional Law (4th Ed.), page 366.
Barbier v. Connolly, 113 U. S. 27.
Mugler v. Kansas, 123 U. S. 623.
Camfield v. United States, 167 U. S. 518.
C. B. & Q. Ry. Co. v. People, 200 U. S. 561.
Sligh v. Kirkwood, 237 U. S. 52.

In Sligh v. Kirkwood, supra, at page 58, the court stated:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legisla-

tion and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. U. S. 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, etc. Ry. v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity. * * ** And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." ' Eubank v. Richmond, 226 U. S. 137, 142.

In Barbier v. Connolly, supra, at page 31, the court said:

"Neither the amendment (refetring to the Fourteenth) —broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Rules relative to validity.

In the case of Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, this court laid down four rules relative to the

validity of a state statute under the Fourteenth Amendment. These rules are found at page 78, and are:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Discussion of Chapter 390.

The lower court, Triner v. Mahoney, 20 Fed. Supp. 1019, at page 1020, points out that Laws of Minnesota for 1935, Chapter 390 is discriminatory as follow:

> "The Minnesota statute discriminates between wholesalers who handle imported brands of liquor which are not registered in the Patent Office and those who handle imported brands of liquor which are registered in the Patent Office. It discriminates between those who import liquor requiring further processing in Minnesota and those importing liquor which does not require further processing in Minnesota. Imported liquor requiring further processing in the State may be sold in the State whether the brand is registered or not, whereas the same kind and quality of liquor, if it is imported into the State ready for sale, can only be sold provided the

brand is registered. Those who sell only liquor manufactured in Minnesota are not affected by the law, while those who import liquor of equal goodness may not sell it in the State unless it bears a registered brand."

The discriminations objected to by the court may be restated to be:

1. Between wholesalers who handle imported brands of liquor which are not registered in the patent office and wholesalers who handle imported brands of liquor which are registered in the patent office.

2. Between wholesalers who import liquors that require further processing and those that import liquors that do not require further processing.

3. Between wholesalers who only sell liquors manufactured in Minnesota and wholesalers who sell liquors imported into the state.

Appellants contend that Chapter 390 does not in any manner discriminate between persons holding the same type of licenses. Each licensee has the same rights and privileges as other licensees of the same class. The discrimination made by the legislature is between the types of intoxicating liquors imported into this state. Intoxicating liquors imported in a ready to sell condition must have their brand names registered in the patent office of the United States. Intoxicating liquors imported in such condition as to require further processing before it is ready for sale may be brought in without having their brand names registered. This distinction does not in any manner affect the rights of the appellee, or others similarly situated, since under their manufacturer's or wholesaler's license they, in common with all other holders of similar licenses, may import iquors in bulk, process the same and sell them under the names of unregis-

tered brands. They, in common with all other licensees, may import liquors ready for sale under brand names which are registered in the patent office of the United States, and they, in common with other licensees, are prohibited from importing liquors under brand names not so registered. It cannot be said that the statute under consideration discriminates against appellee to the advantage of others holding the same class of license. All are on the same level, subject to the same restrictions and the recipients of the same privileges. All licensees holding a manufacturer's or wholesaler's license are equally affected by the terms of Chapter 390. No distinction is made by the terms of the law between various manufacturers and wholesalers within the general class. That some may incidentally suffer more than others through the working of the law does not make the law invalid as being class or special legislation. By virtue of holding manufacturer's licenses, either plaintiff or both may manufacture, ferment, brew, distill, refine, rectify, blend, prepare and produce intoxicating liquors in this state. Section 1, Chapter 46, Extra Session Laws of Minnesota for 1933-34. And in connection therewith they may import intoxicating liquors in bulk, process the same and sell under brand names not registered in the patent office of the United States. In this respect they are on the same basis as those manufacturers now situated in this state who are processing liquors.

The objection that the law purports to discriminate between licensees who handle imported brands of intoxicating liquors which are not registered in the patent office of the United States and licensees who handle imported brands that are registered is of no significance. The obvious answer is that licensees who import unregistered brands should have the brands registered. The fact that due to the mechanics

of the federal government such registration requires a considerable period of time and the expenditure of money is not to be considered an element making the Minnesota law arbitrary and unreasonable. Neither is the fact that certain brand names cannot be registered important. In the case of State Board of Equalization of California v. Young's Market Co., supra, this court held that a state may establish a monopoly of the manufacture and sale of beer and channelize importations by confining them to a single consignee. The court further held that a state could permit the importation of beer and forbid the importation of other liquors. Surely if a state has those powers, it has the right to enact a law prohibiting the importation of liquors ready for sale unless the brand names thereof are registered. The law does not preclude licensees from importing intoxicating liquors. It merely imposes conditions under which such liquors can be brought into this state.

Under the Webb-Kenyon Act and the Twenty-first Amendment, the appellee does not have an absolute right to import intoxicating liquors into this state. His right of importation is determined by the state law. The state, if it so desired, could prohibit all importations of intoxicating liquors. If it permits importations, it may determine under what conditions such liquors may be imported.

Broadly speaking, the power to determine what regulations are necessary to regulate the traffic in intoxicating liquors rests in the legislature of the state enacting the law. This principle has been universally recognized by our courts and is stated by the Supreme Court of the United States in Mugler v. Kansas, 123 U. S. 623, in the following language, at page 661:

> "It belongs to that department to exert what are known as the police powers of the State, and to determine,

primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

A Pennsylvania statute made it unlawful for unnaturalized foreign born residents to kill wild game except in defense of person or property and to that end made the possession by such persons of shot guns and rifles unlawful. The court, in Patsone v. Pennsylvania, 232 U. S. 138, held that the law was not unconstitutional under the Fourteenth Amendment. We quote excerpts from Justice Holmes' opinion, at page 144:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class.

"The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. Barrett v. Indiana, 229 U. S. 26, 29.

"Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. Adams v. Milwaukee, 228 U. S. 572, 583. If we might trust popular speech in some States it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong. See Trageser v. Gray, 73 Maryland, 250. Commonwealth v. Hana, 195 Massachusetts, 262."

Chapter 390 is far more justified in respect to the test applied in this case than was the Pennsylvania statute. The dangers against which that state was legislating were not apparent except to those having local knowledge of the situation. Using this test without anything further, Chapter 390 must be declared constitutional against the particular objection made. However, it is common knowledge that there are dangers in the traffic in alcohol that are inherent to the traffic, and that such traffic has long been subjected to legislative and constitutional control.

The case of Adams v. Milwaukee, 228 U. S. 572, involved a Milwaukee ordinance which provided a different regulation for vendors of milk drawn from cows outside of the City of Milwaukee than was applied to vendors of milk drawn from cows within the city. Plaintiff contended that the ordinance violated the Fourteenth Amendment because it did not affect all persons alike. In passing upon this particular point, the court said, at page 579:

> "If we regard the territorial distinction merely, that is, milk from cows outside and milk from cows within the city, there is certainly no discrimination. All producers outside of the city are treated alike."

The Supreme Court of Wisconsin, in holding the ordinance to be constitutional, held that inspection of the animals producing the milk could not be made outside of the city and consequently there was sufficient basis for the ordinance which required that the containers of milk shipped into Milwaukee bear the name and address of the owner and that the owner file a certificate of a licensed veterinary to the effect that his cows have been found free from tuberculosis.

In passing upon an Iowa statute relating to the liability of railroad corporations for damages sustained by the wilful acts of employes thereof, the court in Chicago, Burlington and Quincy Railroad Company v. McGuire, 219 U. S. 549, said, at page 569:

> "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

PRICE v. ILLINOIS, 238 U. S. 446.

This case involved the sale of a preservative compound contrary to the Illinois Pure Food Law. Plaintiff urged that he was discriminated against. The court remarked, at page 453:

> "The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist."

Chapter 390 was enacted by the legislature of the State of Minnesota as a regulatory measure by virtue of its police powers over the importation of intoxicating liquors. It had a definite purpose in mind, that of protecting the public from spurious brands of intoxicating liquors manufactured outside of the limits of the state. Liquors manufactured or processed in this state can be directly supervised and inspected by local officials. Liquors manufactured outside of the state cannot be. While the registration of the brand

name does not depend upon quality or purity of the product, the registration does fix ownership of the brand and the responsibility of the products sold under such brand. Such law also prevents duplicate brands or brands of similar names from being registered. The fact that Chapter 390 is not the best kind of law to accomplish its purpose is not material. It may be that the Rules and Regulations of the Liquor Control Commissioner as set forth in appellee's Bill of Complaint afford greater protection to the consuming public of this state. The court cannot inquire into that matter. The fact is that the legislature enacted what it deemed the most desirable and best for the welfare of the people of this state. We may differ with the legislature but our difference of opinion is not sufficient reason to declare the law void.

A pertinent statement is found in General Sales & Liquor Co. v. Becker, supra, at pages 350, 351:

> "No principle is better settled than that the state in the exercise of its police powers, in doing what it conceives to be necessary to promote public morals, the public health, and the public safety, may prohibit the manufacture and sale of intoxicating liquor, or may regulate and supervise the manufacture and sale of such liquors in such manner as it conceives to be necessary and proper. Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. In so legislating it may be that private property is destroyed, that some class of individuals are prohibited from or restricted in engaging in the business of selling liquors, but this has never been construed as being prevented by the Fourteenth Amendment.
>
> "The necessity for the full exercise of its authority by the state was never greater than it is at this time. * * * The situation does call for the strictest regula-

tion of the business by all of our governmental agencies, national and state."

The objection that Chapter 390 discriminates in favor of intoxicating liquors manufactured or processed in Minnesota is not tenable.

In Cox v. Texas, 202 U. S. 446, in discussing a statute of the State of Texas, which provided for taxes on sellers of spiritous, vinous, or malt liquors and required an application for a license to be accompanied by a bond, and containing a provision that the same should not apply to wine produced from grapes grown within the state, the court recognized the discrimination and said, at page 450:

> "It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. But to that extent alone, favor is shown to a class."

Replying to the contention that such discrimination was in violation of the Fourteenth Amendment, the court said, at page 451:

> "* * * If the States were restricted by the 14th Amendment only, and saw fit to encourage domestic production, or sought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them."

Also see State v. Parker Distilling Co., 236 Mo. 219, 139 S. W. 453. Intoxicating liquors do not come within the protection of the fourteenth amendment, and the right to possess, make, or deal in such liquors is not a privilege or immunity of citizens of the United States, and, therefore, state legislation prohibiting the importation of intoxicating liquor

or restricting or regulating its manufacture, possession, use, importation, or handling, does not violate the Fourteenth Amendment. Mugler v. Kansas, 123 U. S. 623; Kidd v. Pearson, 128 U. S. 16, Crowley v. Christensen, 137 U. S. 91; Barbau v. Georgia, 249 U. S. 454; Samuels v. McCurdey, 267 U. S. 188; Gray v. Conn., 159 U. S. 777; Clark Distilling Company v. Western Maryland Ry. Co., 242 U. S. 311; Crane v. Campbell, 245 U. S. 304; Bartemeyer v. Iowa, 18 Wall. (U. S.) 129; Beer Company v. Massachusetts, 97 U. S. 25, 33; Purity Extract Co. v. Lynch, 226 U. S. 192, 201.

Appellants contend that a state has the right to discriminate against out of state manufacturers of intoxicating liquors in favor of its own manufacturers, under the Twenty-first Amendment.

This contention is sustained by the court in State Board of Equalization of California v. Young's Market Co., supra. On page 62, the court said:

> "The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

In the case of Premier-Pabst Sales Corporation v. Grosscup, supra, the court said, at page 973:

> "That the effect of some of the regulations may be to favor domestic products or citizens of the state does not in itself render a state law obnoxious to the provisions of the Fourteenth Amendment."

B. The application and protection of the equal protection clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

While appellants do not concede that Chapter 390 is unreasonably and arbitrarily discriminatory, they contend that assuming such to be the case, the equal protection clause of the Fourteenth Amendment has no application thereto. In other words, appellants contend that the Twenty-first Amendment has terminated all restrictions upon the state's power over the importation of intoxicating liquors arising out of the previous provisions of the constitution and has left the state free to enact regulatory or prohibitory laws with reference to the importation of such liquors regardless of whether or not such laws are reasonable, arbitrary or discriminatory as tested by the constitutional provisions previous to the enactment of the amendment. The Twenty-first Amendment, under the precedents established in the construction of the Webb-Kenyon Act, and in the construction of the amendment itself, has enabled the states to absolutely control the importation of intoxicating liquors. Consequently the same rule applies to the power of the states as applies to the power of Congress over foreign commerce. In Buttfield v. Stranahan, 192 U. S. 470, the court, in passing upon the power of Congress over foreign commerce, said, at page 492:

> "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution."

In like manner the power to regulate importations of intoxicating liquors having been vested in the states by a con-

stitutional amendment, the state is limited only by the provisions of its own constitution. Bartemeyer v. Iowa, 18 Wall. 129. We also call the court's attention to United States v. Lanza, 260 U. S. 377, discussed by us under subdivision I hereof, and particularly that part of the decision found at page 381 and reading as follows:

> "In effect, the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits."

We submit that the principle is the same and that the Twenty-first Amendment freed the states from all constitutional restrictions in so far as the importation of intoxicating liquors is concerned.

In Premier-Pabst Sales Corporation v. Grosscup, supra, at page 972, the court said:

> "Prohibition of all sales of alcohol for use as a beverage we call prohibition. The other modified forms of prohibition we call regulation of the traffic. The test of its legality is by the Webb-Kenyon Act (27 U. S. C. A. Sec. 122) and by the Twenty-first Amendment made the law of the importing state. It might have made the test that applied by the Reed Bill—the law of a prohibition state. It was, however, made otherwise—whether the import would be in violation of any law of the state of importation. This test is a constitutional provision. Such provisions, if conflicting, are subject to the rule applying to conflicting statutes. The latest controls. The provisions of the original Constitution, as of the earlier amendments, must give way to the later."

In this respect, this court, in the case of State Board of Equalization of California v. Young's Market Co., supra, said, at page 64:

> "The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

The court, at the same page, then went on to say:

> "Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment."

It appears from a reading of the above quoted portion of the case that this court found the California law under attack to be a reasonable exercise of police power, but that if the law had not been reasonable, it still would have been a valid exercise of power under the Twenty-first Amendment and therefore could not be in violation of the Fourteenth Amendment. Unless such is the meaning, the words "a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth," would have no meaning. If such language has no meaning, it would not have been used.

In said case plaintiffs argued that the history of the Twenty-first Amendment and the decisions of this court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment sustains the argument that the Twenty-first Amendment is limited by the usual tests of reasonableness. The court brushes aside this argument and states, at pages 63, 64:

> "As we think the language of the Amendment is clear, we do not discuss these matters."

In addition to the language of the amendment being clear, the history thereof clearly shows that the intention of the

amendment is to grant the powers to the states that are contended for by appellants herein. Without desiring to repeat, we call the court's attention to the statement of Representative McSwaine, Vol. 76, Cong. Rec., p. 4522, as follows:

> "The proposed amendment to the Constitution is, in effect, a proposal to repeal the Eighteenth Amendment, but also to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever."

In other words, the states shall have the absolute control over the traffic in intoxicating liquors both as to importation into and to the use and sale therein.

While this construction on the Twenty-first Amendment appears, at first blush, to be a radical departure from the heretofore established law, when we take into consideration the nature of the merchandise involved and the development of the power of the states to control such merchandise, such a step is a sound one. The right to engage in the trafficking in intoxicating liquors is not an inherent right of a citizen. The traffic in intoxicating liquors is dangerous to the public unless stringently regulated. As is said in Premier-Pabst Sales Corporation v. Grosscup, supra, at pages 972, 973:

> "The traffic in intoxicating liquors is universally known to be loaded with danger to the public weal. It may be subjected to the most stringent regulation. Licenses to sell to the ultimate consumer may be limited to those who in the conduct of the business can be brought under control and supervision. The traffic is one emphatically 'fraught with a public interest.' No one can claim 'the right and privilege' to do harm to others. The regulation of the traffic by state laws, in the attempt to minimize the evils attending it, is no infringement of the rights of any one. It is no denial of any of 'the

privilege and immunities' of the citizens of the United States. De Grazier v. Stephens, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059; In re Irish, 121 Kan. 72, 250 P. 1056, 61 A. L. R. 337, and cases cited in notes."

In discussing the meaning of the Twenty-first Amendment, this court in State Board of Equalization of California v. Young's Market Co., supra, said, at pages 62, 63:

"The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would not involve a construction of the amendment, but a rewriting of it."

Carrying out this thought further, we contend that the state need not allow nonresidents to import intoxicating liquors on equal terms with each other. This thought is borne out when in the above case the court says, at page 63, that a state to discourage importations may "channelize desired importations by confining them to a single consignee."

The Twenty-first Amendment clearly registers the purpose of the American people to restore to the states their full sovereignty and authority to control intoxicating liquors. This gives the states the power to prohibit, limit or regulate importations thereof and to do so without regard to the limitations of the previous provisions of the Constitution of the United States. To hold otherwise would defeat the purpose of the amendment.

III.

FREEDOM OF CONTRACT CLAUSE.

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the freedom of contract clause, Article I, Section 10, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

A. Chapter 390 is a reasonable exercise of the police power of the State of Minnesota.

In this connection it is not necessary to restate appellants' argument as to the reasonablenes of the statute under consideration set forth under subsection A of Subdivision II of this brief relating to the equal protection clause. Suffice it to say that if the statute under discussion is a reasonable exercise of the police power of the state, it does not violate the freedom of contract clause, which clause is found in Article I, Section 10, of the Constitution of the United States, and reads:

> "No state shall * * * pass any * * * law impairing the obligation of contracts."

In discussing this constitutional provision, the court in New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, remarked, at page 672:

> "The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other

may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

Every contract is entered into subject to the implied limitation that its terms may be varied in a reasonable manner under the exercise of the police power of the state. This limitation upon contract rights is as much a part of any contract as if it were incorporated therein in writing. This is especially true with contracts relative to the intoxicating liquor business where contracts have been entered into for the purchase and sale of such liquors.

In Manigault v. Springs, 199 U. S. 473, the court said, at page 480:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In like manner in Atlantic Coast Line Railroad Co. v. City of Goldsboro, 232 U. S. 548, the court said, at page 558:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the

> power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, the court used similar language, at page 376:

> "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to defeat the legitimate government authority."

In Marcus Brown Holding Co. v. Feldman, 269 Fed. 306, affirmed in 256 U. S. 170, the court said, at page 315:

> "It cannot be too often said that a constitution is not a code nor a statute, that it declares only fundamental principles, and is not 'to be interpreted with the strictness of a private contract.' Legal Tender Cases, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community—that is, to exercise the police power of the state."

B. The application and protection of the freedom of contract clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

In this connection we refer to our discussion under subsection B of subdivision II, relating to the equal protection

clause, and adopt the same argument as applying to the freedom of contract clause with the same force and effect as to the equal protection clause.

IV.

DUE PROCESS CLAUSE.

Laws of Minnesota, Chapter 390, is not unconstitutional as being in contravention of the due process clause, Article XIV, Section 1, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale or use therein by the Twenty-first Amendment to the Constitution of the United States.

A. Chapter 390 is a reasonable exercise of the police power of the State of Minnesota.

It is not necessary, under this heading, to rediscuss appellants' argument as to the reasonableness of the statute under consideration set forth under subsection A of II of this brief relating to the equal protection clause. If the statute is a reasonable exercise of the police power of the state, it does not offend the due process clause of the Fourteenth Amendment.

The due process clause, Article XIV, Section 1, provides:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; * * *."

It is a well settled doctrine that in legislating in behalf of the public morals, health and safety, the state by reason of

its police power may enact laws which incidentally impair property value, or even destroy it altogether.

Mugler v. Kansas, 123 U. S. 623.
Patsone v. Pennsylvania, 232 U. S. 138.
Silz v. Hesterberg, 211 U. S. 31.

In Mugler v. Kansas, 123 U. S. 623, it appeared that the defendants owned certain breweries, the use of which was enjoined by the Kansas Prohibition Act. Plaintiff contended that they were under the protection of the Fourteenth Amendment and compensation should be paid before the Act was put into effect. The court, speaking through Justice Harlan, said, at pages 668, 669:

> "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the

safety of the public, is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.

"It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in Stone v. Mississippi, above cited, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself.' "

In Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, the court said, at page 253:

"But it is equally the doctrine of this court that the power, whether called police, governmental or legislative, exists in each State, by appropriate legislation, not forbidden by its own constitution or by the Constitution of the United States, to determine for its people all questions or matters relating to its purely domestic or internal affairs, and, 'to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public con-

venience and the public good.' Lake Shore and Michigan Southern Railway v. Ohio, 173 U. S. 285, 297, and authorities there cited."

Chapter 390, being a law enacted in the reasonable police power of the state, is not in violation of the due process clause of the federal constitution. This law does not interfere with any vested property rights. The right to engage in the liquor business is at sufferance only and carries with it no vested rights. The sale of such liquors may be abolished at the will of the state and plaintiffs' businesses totally destroyed and such destruction would be perfectly valid.

B. The application and protection of the due process clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

In this connection we refer to our discussion under subsection B of subdivision II, relating to the equal protection clause, and adopt the same argument as applying to the due process clause with the same force and effect as to the equal protection clause.

V.

CONCLUSION.

Appellants contend that inasmuch as the State of Minnesota has enacted laws regulating the importation, use and traffic in intoxicating liquors, the Twenty-first Amendment to the Constitution of the United States has removed the protection and application of the commerce clause, equal protection clause, freedom of contract clause and due process

clause from such liquors imported into the State of Minnesota for the purpose of use and sale therein; that the provisions of Laws of 1935, Chapter 390, do not unreasonably and arbitrarily discriminate against such importation; and further that said statute is a reasonable exercise of the police power of the State of Minnesota.

It is, therefore, respectfully submitted that this court should review the decision of the District Court for the District of Minnesota, Fourth Division, reverse it and dissolve the permanent injunction entered in pursuance to the final decree of said court.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 761

WILLIAM MAHONEY, as Liquor Control Commissioner of the State of Minnesota, et al.,

Appellants,

vs.

JOSEPH TRINER CORPORATION,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

SUMMARY OF ARGUMENT.

I.

THE TWENTY-FIRST AMENDMENT.

The adoption of the Twenty-first Amendment to the Constitution of the United States did not add to nor detract from the police power of the States over traffic in intoxicating liquors, as limited by Section 1 of Article 14 of the Constitution. The Amendment did no more than free the States from restrictions imposed by the Commerce Clause, Article 1, Section 8, Clause 3 of the Federal Constitution.

II.

THE FOURTEENTH AMENDMENT.

Chapter 390, Laws of Minnesota for 1935, contravenes the "equal protection" clause of Article 14, Section 1 of the Constitution of the United States, in that it is arbitrary, unreasonable and discriminatory, and exceeds a proper and legitimate exercise of the police power.

ARGUMENT.

The appellants contend upon this appeal, that Chapter 390, Laws of Minnesota, 1935, does not contravene the following provisions of the Constitution of the United States:

I. The Commerce Clause, Article 1, Section 8, Clause 3.

II. The Equal Protection Clause, Article 14, Section 1.

III. The Freedom of Contract Clause, Article 1, Section 10.

IV. The Due Process Clause, Article 14, Section 1.

The above contentions present issues that were not urged or passed upon by the Trial Court. It is true that upon the application for an interlocutory injunction the plaintiff urged that the Statute in question infringed upon the Commerce Clause of the Constitution, but before a hearing was had upon the merits, this Court decided the case of *State Board of Equalization of California vs. Young's Market Co.*, 299 U. S. 59. The Trial Court, with due deference to that opinion, did not hold that the Statute in question contravened the Commerce Clause. It was not urged in the lower Court, nor did that Court find that the Statute in question contra-

vened either the "contract" clause or the "due process" clause of the Constitution, and we make no such contention here.

For the purpose of making it clear as to the questions decided by the lower Court, we quote from that Court's opinion, 20 Federal Supp. 1019, on Page 1021:

> "It is to be noted, however, that the Supreme Court expressly found it unnecessary to declare that the Twenty-first Amendment, with respect to liquor, had freed the states from all restrictions upon their police power which are to be found in the Constitution of the United States. It seems fair to assume, under the circumstances, that the Supreme Court was by no means convinced that the Twenty-first Amendment left the States free from the restrictions of the equal protection clause in dealing with intoxicating liquor.
>
> We are not convinced that our conclusion that the Minnesota statute here assailed was invalid as violating the equal protection clause of the Constitution was wrong; and, in the absence of a decision of the Supreme Court of the United States holding that a state may, by virtue of the Twenty-first Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquor, which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the Fourteenth Amendment, we think this court ought not so to declare."

The issues as we view them upon this appeal are, briefly stated: Did the adoption of the Twenty-first Amendment deprive the plaintiff of the protection vouchsafed to it by the Fourteenth Amendment? and Does the Statute in question contravene the "equal protection" clause of Article 14, Section 1 of the Constitution?

It is our purpose to consider first the Twenty-first Amendment, and second the Fourteenth Amendment and its bearing upon the Statute here involved.

I.

THE TWENTY-FIRST AMENDMENT.

For years prior to the adoption of the Eighteenth Amendment, the dry States were powerless to fully protect their publicly declared policy of prohibition, due to the Commerce Clause of the Constitution. To obviate the difficulties experienced, and the decisions of the Courts construing the Commerce Clause in cases involving intoxicating liquor, the Wilson Act was passed by Congress on August 8, 1890 (26 Stat. 313). This Statute did not, however, free the States of intoxicating liquors moving in interstate commerce.

To afford them further protection, the Webb-Kenyon Act was adopted in 1913. This Statute simply extended the scope of the Wilson Act. *Adams Express Co. vs. Kentucky*, 238 U. S. 190; *James Clark Distilling Co. vs. Western Maryland Railway Co.*, 242 U. S. 311.

Neither Statute had any effect upon the restrictions imposed upon the States under the Fourteenth Amendment. Congress had no power to enact any such legislation. If it did have, Congress, and not the Constitution, would be supreme.

Owing to the fact that the Webb-Kenyon law had been sustained on constitutional grounds by a divided Court, in *James Clark Distilling Co. vs. Western Maryland Railway Co.*, 242 U. S. 311, and was subject to repeal at any time by Congress, when the adoption of an amendment to the Constitution for the purpose of repealing the Eighteenth Amendment was before Congress for consideration, it was deemed advisable that the repealing amendment should incorporate the provisions of the Webb-Kenyon Act. The debates in Congress show that such was the intention.

On pages 4170-4172, Volume 76 of the Congressional Record, Senator Borah in discussing the proposed Twenty-first Amendment said:

> "Sec. 2 is to protect the dry states. This amendment is vital. It has been said that the Webb-Kenyon Act is a sufficient protection to the dry states. The Webb-Kenyon Act was sustained by the Supreme Court by a divided court. President Taft (afterwards Chief Justice) vetoed it on the ground that it was unconstitutional. The Attorney-General rendered an opinion that it was unconstitutional. Mr. Justice Sutherland, then a Senator and now on the Supreme Court, argued before the Senate that it was unconstitutional. Therefore we are turning the dry states over for protection to a law which is still of doubtful constitutionality and which might be held unconstitutional upon re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law. Under the Wilson Act as well as before the liquor interests corrupted the states. * * * All this was sought to be remedied by the Webb-Kenyon Act and I am very glad that it is to be permanently incorporated into the Constitution."

Senator Blaine, on behalf of the Senate Judiciary Committee, at pages 4140-4141, Volume 76 of the Congressional Record, made the following remarks:

> "The committee was unanimous that the language used would effectuate the purpose that is obviously designed by Sec. 2. It is claimed however and with some degree of assurance for the future that Congress now has the power to protect the so-called dry states in the regulation of intoxicating liquors. * * * The Clark case was a divided opinion. * * * There has been a divided opinion in respect to the earlier cases and that division of opinion seems to have come down to a very late day, so as to assure the so-called dry states against

importation of intoxicating liquors into those states it is proposed to write permanently into the Constitution a prohibition along that line."

A speech of Jouett Shouse, incorporated in Volume 76 of the Congressional Record, page 2198, contains the following:

"Sec. Two (The Webb-Kenyon re-enactment) is superfluous. It would seek to put into the Constitution the protection for the so-called dry states against shipment of liquor from outside. The power to afford such protection is already inherent in Congress under the commerce clause of the Constitution and legislation with this in view has been on the statute books for years as embodied in the Webb-Kenyon law. * * * It was upheld as a right of Congress under the commerce clause to pass all legislation to protect the States whose laws prohibit the importation or sale of liquor. I have no quarrel with the clause."

The above quotations from the Congressional Record show a desire on the part of Congress to give permanency to the provisions of the Webb-Kenyon Act.

A comparison of the language of the act and the amendment throws light on the purpose of the latter. The Webb-Kenyon Act, with extraneous words omitted, reads:

"The shipment or transportation * * * of * * * intoxicating liquor * * * from one state * * * into any other state * * * which intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used either in the original package or otherwise, in violation of any law of such state, is hereby prohibited." (37 Stat. 699).

The second section of the Twenty-first Amendment provides:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited."

It will be observed that both the Amendment and the Webb-Kenyon Act prohibit the importation into a State of intoxicating liquors in violation of the laws thereof. The language used in each is practically identical. There is no intimation that it was the purpose of Congress to in any way disturb the provisions of the Fourteenth Amendment.

The evils sought to be reached by the Wilson Act and the Webb-Kenyon Act, arose under the restrictions imposed upon the States by the Commerce Clause. Those evils prompted the Twenty-first Amendment. Therefore, in construing the latter, it is proper to take into consideration the mischief sought to be prevented.

Craig vs. Missouri, 4 Pet. 410.

The condition of affairs out of which the Twenty-first Amendment arose, suggests that the language therein used should be so construed as to forward the known purpose of the amendment.

Maxwell vs. Dow, 176 U. S. 581.

We take it to be sound law that one constitutional provision should not be construed to nullify another unless absolutely required by its context.

Marbury vs. Madison, 1 Cranch 137.

In the case of *Billings vs. U. S.*, 232 U. S. 261, Chief Justice White, speaking for this Court, said:

> "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immed-

iately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the Amendments thereto, especially by the due process clause of the 5th Amendment."

With the above principles before us, we look to the language of the Twenty-first Amendment. Section 1, by express language, repeals the Eighteenth Amendment, and by the second section clearly unburdens the States from the Commerce Clause, but there is no language which either directly or by implication makes reference to the Fourteenth Amendment. If Congress had intended to abrogate the Fourteenth Amendment, it would undoubtedly have used apt language for that purpose. It did so as to the Eighteenth Amendment and the Commerce Clause. The phrase "in violation of the laws thereof" means laws which would be void as burdening commerce, without the Twenty-first Amendment or appropriate legislation such as the Webb-Kenyon Act. It certainly does not mean that a state may now enact legislation without any restriction whatever. Such a construction would create a condition more intolerable than the one which the amendment was designed to remove. Each State would be freed to enact reprisal statutes and arbitrary and discriminatory regulations of all kinds against its own citizens and citizens of other states without limitation.

There is just as much reason and logic to support a claim that the Twenty-first Amendment repealed the entire Fourteenth Amendment in so far as the liquor business is concerned, as to support the argument advanced here. If a person engaged in the liquor business is no longer entitled "to the equal protection of the law", it follows that his property may be taken from him without "due process of law."

Let us assume that the Legislature of Minnesota enacts a statute authorizing the State to engage in the manufacture of intoxicating liquors in competition with private capital, and empowers the liquor control Commissioner, without notice, hearing or compensation to seize and appropriate any distillery in Minnesota owned by a citizen of another State who is lawfully operating the same. Would the Fourteenth Amendment afford the distillery owner protection? The answer is obviously yes, unless the Twenty-first Amendment has destroyed that protection.

Let us assume that a law is enacted in Minnesota authorizing the entry of judgment in an action involving the purchase price of liquor lawfully sold, by merely filing a complaint and without serving notice or process on the defendant. Would the "due process" clause afford the defendant protection? Certainly, unless that protection has been taken away by the Twenty-first Amendment.

This Court was first called upon to construe the Twenty-first Amendment in the case of *Premier-Pabst Sales Co. vs. Grosscup*, 298 U. S. 226. With reference to the constitutional questions there raised, the Court said:

> "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution, must show that the alleged unconstitutional feature injures him."

The only other case in this Court having to do with the Twenty-first Amendment is that of *State Board of Equalization of California, et al. vs. Young's Market Co.*, 299 U. S. 59. During the course of the opinion, the Court said:

> "The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer."

This quotation clearly shows that the main question considered by the Court was the effect of the Twenty-first Amendment upon the Commerce Clause.

With reference to the effect of the Amendment upon the Fourteenth Amendment, the Court said:

> "The plaintiffs insist that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution. The question for decision requires no such generalization."

The language just quoted would seem to indicate that it was not the intention of the Court to construe the Twenty-first Amendment as removing all restrictions upon the police power of the States.

The lower Court in the instant case, 20 Fed. Supp. 1019, on Page 1020 of the opinion said:

> "We have read with great care the decision of the Supreme Court of the United States in the California case referred to. That court held that under the Twenty-first Amendment a state may exact a license fee for the privilege of importing beer from other states; that the Twenty-First Amendment abrogated the right to import free so far as intoxicating liquors were concerned; and that the imposition of the importer's license fee by the state of California was not in violation of the commerce clause of the Federal Constitution. The contention that the California statute violated the equal protection clause, the Supreme Court disposed of in the

following language (299 U. S. 59, at page 64, 57 S. Ct. 77, 79, 81 L. Ed. 38): 'Second. The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment. Beer sold within the state comes from two sources. The brewer of the domestic article may be required to pay a license fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compair Brown-Forman Co. vs. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license-fee of $500. Compare Kidd v. Alabama, 188 U. S. 730, 732, 23 S. Ct. 401, 47 L. Ed. 669.'

In discussing the claim that the statute violated the commerce clause, the Supreme Court made this statement (299 U. S. 59, at page 62, 57 S. Ct. 77, 78, 81 L. Ed. 38): 'The amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.'

If that language be construed to mean that a state may impose any conditions with respect to importations of intoxicating liquors, whether arbitrary and unreasonable or not, it sustains the contention which the defendants here make that, regardless of whether the statute of Minnesota has a reasonable or an unreasonable relation to the subject-matter, it must, nevertheless, be sustained. It is to be noted, however, that the Supreme Court expressly found it unnecessary to declare that the Twenty-First Amendment, with respect to liquor, had

freed the States from all restrictions upon their police power which are to be found in the Constitution of the United States. It seems fair to assume, under the circumstances, that the Supreme Court was by no means convinced that the Twenty-First Amendment left the States free from the restrictions of the equal protection clause in dealing with intoxicating liquor.

We are not convinced that our conclusion that the Minnesota statute here assailed was invalid as violating the equal protection clause of the Constitution was wrong; and, in the absence of a decision of the Supreme Court of the United States holding that a state may, by virtue of the Twenty-First Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquor which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the Fourteenth Amendment, we think this court ought not so to declare."

In the case of *Shore vs. Cross,* 7 Fed. Supp. 70, a three-judge Federal Court had before it for consideration, a Statute of the State of Connecticut, which was challenged on the ground that it deprived the plaintiff of the equal protection of the laws. In that case the Court held the Connecticut Statute was not discriminatory, but during the course of the opinion said:

"To be sure, even in its control of the liquor traffic, the Legislature could not resort to classifications that were wholly arbitrary and without any reasonable relation to the public welfare."

The above case was decided after the adoption of the Twenty-first Amendment.

In the case of *Sancho vs. Corona Brewing Corporation,* 89 Fed. (2d) 479, the Circuit Court of Appeals of the First Circuit said:

"The Twenty-First Amendment simply withdraws the exclusive control of Congress, under the commerce clause (article 1, Sec. 8, cl. 3), over commerce in intoxicating liquors, when their importation is in violation of the laws of a state, territory, or possession of the United States."

In the case of *Indianapolis Brewing Company vs. the Liquor Control Commission of the State of Michigan, et al.*, decided by a three-judge Court on February 3, 1938 (opinion not yet reported), a liquor Statute of the State of Michigan was challenged on two grounds, namely: (a) that it violated the "Commerce Clause", and (b) the "equal protection" clause of the Fourteenth Amendment.

As to the first ground, the Court said:

"While the bill assails validity in respect to numerous provisions of the Federal and State Constitutions, the issue upon consideration of the decision in *State Board of Equalization vs. Youngs Market Co., et al.*, 299 U. S. 51, followed and applied by a local three judge court in *Zukaitis, et al. vs. Fitzgerald, et al.*, 18 Fed. Supp. 1000, has now been narrowed in argument and briefs to a consideration of the assailed statute in respect to invalidity under the 'Equal Protection Clause' of the Fourteenth Amendment. This is the plaintiff's main reliance."

As to the second ground the Court held that the Statute did not offend against the Fourteenth Amendment.

The decision of the lower Court which is involved in this appeal was there cited as an authority. The Court in considering the same said:

"The plaintiff relies very largely for support to its assault upon the reasonableness of the classification upon the decision of a three-judge court in Minnesota in the case of *Joseph Triner Corp. vs. Mahoney, State Liquor Control Commissioner*, 11 Fed. Supp. 145, decided

originally before the announcement of the decision in the Young's Market case but thereafter to the same effect under the style of Triner Corp. vs. Arundel, 20 Fed. Supp. 1019. It is sufficient to say that the Triner case involved a classification wholly dissimilar to that here considered, that the Minnesota court found no reasonable basis for it, while for that here involved we do."

We are advised that an appeal to this Court from the above decision is now being perfected.

The appellants cite the case of *Finch & Company vs. McKittrick,* unreported, which was decided on February 24, 1938, by a three-judge Court. A Missouri Statute was therein challenged on the grounds that (a) it violated the Commerce Clause, and (b) the "equal protection" clause of the Fourteenth Amendment.

The Court disposed of the first ground upon the authority of *State Board of Equalization of California, et al. vs. Young's Market Co.,* 299 U. S. 59. As to the second ground, the Court said:

"2. The opinion and judgment in State Board v. Young's Market Co. do not, however, dispose of the second contention made by plaintiffs. It was indeed contended in that case that the challenged California statute violated the 'equal protection' clause. The classification of that statute was: *importers* of beer and *manufacturers of beer within the state.* The statute discriminated against the first class in favor of the second class (although that discrimination perhaps was counter-balanced). The Court said: 'A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.' But the classification which is 'recognized by the Twenty-first Amendment' is one based on a distinction between intoxicating liquors manufactured *within* and *without* a state. It

> does not authorize a distinction between intoxicating liquors all of which are manufactured in other states. The classification made by the Missouri statute must stand or fall as may be required by the general principles developed for the enforcement of the Fourteenth Amendment."

It is our information that an appeal is being perfected from the above decision to this Court.

Appellants cite *General Sales & Liquor Co. vs. Becker,* 14 Fed. Supp. 348. The Court there considered and approved of the decision of the lower court in the instant case. After reaching its conclusion as to constitutionality of the law there involved, the Court said, at page 350 of the opinion:

> "This conclusion is in complete accord with that of the District Court in Joseph Triner Corporation vs. Arundel, 11 F. Supp. 145."

The decision above cited in the Triner case was rendered upon the application for an interlocutory injunction.

The conclusion to be drawn from the authorities above cited is that the Twenty-first Amendment relieved the States from the restrictions and limitations imposed upon them by the Commerce Clause but left unimpaired the inhibitory provisions of the Fourteenth Amendment.

II.

THE FOURTEENTH AMENDMENT.

Chapter 390, Laws of Minnesota for 1935, contravenes the "equal protection" clause of Article 14, Section 1 of the Constitution of the United States, in that it is arbitrary, unreasonable and discriminatory, and exceeds the proper and legitimate exercise of the police power.

The Statute above cited provides:

> "Section 1. No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

It is our purpose to first consider some general principles of law having to do with the police power and the Fourteenth Amendment, and then consider the application of the same to the Statute in question.

A.

A State has the undoubted right under the police power, to enact legislation in the interest of public health, safety and morals, and to promote the public welfare, but it cannot under guise of the police power, overthrow or impair the rights secured or protected by the Fourteenth Amendment.

In the case of *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, this Court said:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary, notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States

> can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden,* 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport,* 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co. v. Haber,* 169 U. S. 613, 626, 42 L. ed. 878, 883, 18 Sup. Ct. Rep. 488."

In the later case of *Buchanan vs. Warley,* 245 U. S. 60, the following language was used:

> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety, and welfare, is very broad, as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

It is difficult to formulate an all embracing definition of what is meant by the term "equal protection of the laws,"

but it is clear, as stated by this Court in *Missouri vs. Lewis*, 101 U. S. 22, 31, that the expression means:

> "That no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances,"

and as stated by this Court in *Barbier vs. Connolly*, 113 U. S. 27, 31, that:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition * * *."

While the Legislature has the undoubted right to establish reasonable classifications for legislative purposes, it cannot make arbitrary classifications without denying the equal protection of the laws. A classification to be valid must affect alike, all persons in the same class and under similar conditions. There must be uniformity within the class and if persons under the same circumstances and con-

ditions are treated differently, an arbitrary discrimination results and there is a failure of proper classification. Arbitrary selection cannot be justified as a classification. This is not equal protection of the laws. *Barbier vs. Connolly,* 113 U. S. 27, 31. *Civil Rights Cases,* 109 U. S. 3. *Duncan vs. Missouri,* 152 U. S. 377. *Gulf etc. R. Co. vs. Ellis,* 165 U. S. 150. *Billings vs. Illinois,* 188 U. S. 97

Any discrimination is invalid if it is purely arbitrary, oppressive or capricious. *American Sugar Refining Company vs. Louisiana,* 179 U. S. 89.

Where a law is made applicable to one class of citizens only, it must rest upon some substantial difference between the situations of that class and others to which it does not apply. *Seaboard Air Lines vs. Seegers,* 207 U. S. 73.

B.

Minnesota is not dry territory. It licenses manufacturers and wholesalers of, and off sale and on sale retail dealers in, beer wines and distilled liquors of all kinds. A comprehensive regulatory law (Chap. 46, Extra Session Laws of Minnesota, 1934) has been enacted which makes no distinction between imported and domestic products. This law classifies manufacturers and wholesalers in one group and applies equally to resident or non-resident importers of intoxicating liquors. The license of the resident and non-resident manufacturer and wholesaler is the same. Liquor of domestic manufacture is controlled in exactly the same way as imported liquors. The Statute here involved also treats manufacturers and wholesalers as a class, but then arbitrarily discriminates in favor of the person who (a) has registered his brand in the patent office, or (b) imports liquor requiring further processing into Minnesota, or (c) is a resi-

dent manufacturer or wholesaler handling only Minnesota Products, and against the person who imports liquor without a registered brand.

The basic factor of discrimination is the requirement that brands be registered in the Patent Office. The appellee, up to the time the Statute was enacted, imported various unregistered brands into the State, many of which cannot be registered. These brands are now denied admission (R. Page 33).

The Trade Mark Act (Sec. 85, Title 15, U. S. C. A.) excludes from registration many brands which do not measure up to its requirements.

The primary and proper function of a trade mark is to identify the origin or ownership of the article to which it is affixed. *Hanover Star Milling Co. vs. Metcalf*, 240 U. S. 403.

The registration in the Patent Office simply fixes the time of the appropriation of the registrant. No substantive rights are thereby created. *U. S. Drug Co. vs. Rectanus*, 248 U. S. 90. *Trade Mark Cases*, 100 U. S. 82. *U. S. Printing and Lithographing Co. vs. Griggs, Cooper & Co.*, 279 U. S. 156.

The registration of the mark does not give any protection within a state in advance of user therein or against prior good faith users thereof. The decisions last above cited so hold.

An earlier user of a mark cannot be deprived of his rights therein by a registration thereof by another party. If this were not true, the act of registration would become a sword and not a shield. *Ubeda vs. Zialcita*, 226 U. S. 452.

Nothing in the Trade Mark Act or registration thereunder has anything to do with the kind or quality of merchandise which wears the mark.

Had the Legislature of Minnesota required the importers of intoxicating liquor to comply with a law similar to the Pure Food and Drug Act and to label their products showing compliance, there would be some basis for argument that the law was to protect public health, but the law here under consideration has no such merits. The General Liquor Control Statute of the State of Minnesota affords far greater protection to the State and consuming public than the law here challenged.

In Paragraph Six of the bill of complaint (R. Page 3) it is alleged that the appellee for the purpose of complying with the laws of the State of Minnesota and the rules and regulations of the Liquor Control Commissioner, registered and filed with said Commissioner, the various brands of liquor which the appellee proposed and intended to sell and import into the State of Minnesota. It is further alleged that the appellee furnished to said Commissioner and filed with said brands, a chemical analysis of each of the brands of liquor which were accepted and approved by the Commissioner. The appellants in their Answer admit all of the allegations of Paragraph Six of the bill of complaint (R. Page 13).

It is obvious that the requirement of the Statute here questioned can add nothing to the requirements of the Liquor Control Act. The latter Act is undoubtedly within the police power of the State. It applies uniformly to all wholesalers and importers, whether resident or non-resident.

But the law here challenged does not contain the provisions which support the validity of the Liquor Control Act. On the contrary, it, by design and operation, proceeds arbitrarily and capriciously to take from and destroy the rights of the appellee which the Fourteenth Amendment was designed to protect.

The Trial Court found, and it is not questioned here, that the appellee has spent substantial sums of money in advertising and sales promotion work in Minnesota; that it has built up and established an extensive demand for each of its brands and has developed an extensive and valuable good-will in connection therewith, and realized a substantial profit through the sale of liquor bearing the same.

Good-will is property. It is a valuable contributing aid to business. The owner of a good-will is, as this Court said in *McClean vs. Fleming*, 96 U. S. 245, 252,

> "entitled to protection as against one who attempts to deprive him of the benefits resulting from the same by using his labels and trade mark without his consent and authority."

But the Statute in question has effectively deprived the appellee of the good-will of his business in the State of Minnesota by making it possible for any manufacturer in that State to appropriate the brands of the appellee to his own use, together with all of the good-will connected therewith, and the Courts are rendered powerless to afford injunctive relief or award damages on account of such appropriation and use.

As to the brands which possess the prerequisites for registration but cannot be registered due to a prior registration by another, the appellee is forced from the State of Minnesota, although the registered owner has never transacted business therein. This situation enables the registered owner to appropriate the business of the appellee which he could not do in the absence of the Statute here assailed. There is no such difference between domestic and importing manufacturers that justifies the requirement that the brand of one and not the other be registered.

The lower Court in its opinion (*Joseph Triner Corporation vs. Mahoney*, 20 Fed. Supp. 1019) on Page 1020 thereof, said:

> "The Minnesota statute discriminates between wholesalers who handle imported brands of liquor which are not registered in the Patent Office and those who handle imported brands of liquor which are registered in the Patent Office. It discriminates between those who import liquor requiring further processing in Minnesota and those importing liquor which does not require further processing in Minnesota. Imported liquor requiring further processing in the state may be sold in the state whether the brand is registered or not, whereas the same kind and quality of liquor, if it is imported into the state ready for sale, can only be sold provided the brand is registered. Those who sell only liquor manufactured in Minnesota are not affected by the law, while those who import liquor of equal goodness may not sell it in the state unless it bears a registered brand.
>
> It seems to us that there is a vast distinction between levying a uniform license tax upon wholesalers dealing in imported liquor, and prohibiting a licensed wholesaler from dealing in imported liquor ready for sale, merely because the brand or trade-name by which the liquor is known is not registered in the Patent Office. Licensing and imposing license fees and taxes is an ancient and well-recognized method of regulating businesses of all kinds, but, so far as we are aware, no other attempt has ever been made by a state to regulate and control the importation of intoxicating liquor because of the registration or nonregistration in the Patent Office of the trade-name which is applied to it. If we were convinced that the statute here in question had any reasonable relation to the regulation or control of the liquor traffic within the state of Minnesota, we would unhesitatingly dismiss these suits. If there in fact exists a reasonable basis for permitting the importation of the

same kind and quality of liquor bearing an unregistered brand or a brand which is not subject to registration, we are unable to visualize it. We can see a relation between the United States Pure Food and Drug Act (as amended, 21 U. S. C. A. Sec. 1 et seq.) and the kind of liquor which is offered to the public for consumption, but we can see no relation between the laws of the United States which permit the registration of certain tradenames in the Patent Office and the kind and quality of liquor which is offered to the public.'

Legislation of the type here challenged has been before this Court on a number of occasions. In the case of *Liggett Co. vs. Baldridge,* 278 U. S. 105, a Statute was involved which prohibited the ownership of a pharmacy or drug store by a corporation whose stockholders were not all registered pharmacists. That Statute was held arbitrary and unreasonable. During the course of the opinion the Court said:

"It, therefore, will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicines; he cannot, unless he be a licensed physician, prescribe for the sick; he cannot, unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.

The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right, and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit

lawful occupations or impose unreasonable and unnecessary restrictions upon them.' (Citing cases)

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the 14th Amendment."

The above decision is particularly applicable here. From the language above quoted, it appears that pharmacists were registered and their activities thoroughly controlled and limited. As the Court said:

"Every point at which the public health is likely to be injuriously affected by the act of the owner in buying,

compounding or selling drugs and medicines is amply safeguarded."

In the instant case, the public health is likewise amply safeguarded by the General Liquor Control Statutes and the rules promulgated thereunder which require the recording of brands and the filing of a chemical analysis of the same with the Liquor Control Commissioner.

In the Liggett case the Court held:

"The act under review does not deal with any of the things covered by the prior statutes above enumerated."

In the instant case, the Statute here questioned does not deal with the same subject matter as the Liquor Control Statute, except to the extent that it requires a limited number of brands only to be registered in the Patent Office.

In the recent case of *Mayflower Farms vs. Ten Eyck*, 297 U. S. 266, the Court had before it for consideration a Statute of the State of New York, reading as follows:

"It shall not be unlawful for any milk dealer who (at the time this act shall take effect is) *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well-advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed (by the board) for such sales to stores in such a city."

The above Statute does not involve the registration of a brand, but does include as a controlling factor the not having of a "well-advertised trade name." The difference between the two does not seem material.

With reference to the above Statute, the Court said at Page 272 of the opinion:

> "The appellant had not a well-advertised trade name. The reason for refusing it a license was that though it had not been continuously in the business of dealing in milk since April 10, 1933, it had sold and was selling to stores milk at a price a cent below the established minimum price. The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimination which has no foundation in the circumstances of those engaging in the milk business in New York City, and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the Fourteenth Amendment.
>
> The record discloses no reason for the discrimination."
>
> * * *
>
> "The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

In the above opinion, the Court emphasized the absence of facts to justify the discrimination.

In the recent case of *Hartford S. B. I. & Ins. Co. v. Harrison,* 301 U. S. 459, the Court considered a Statute of Georgia, which discriminated between resident and non-resident insurance agents. To sustain the act, the difference between mutual and stock companies was urged as a basis for classification. The law was held to violate the Fourteenth Amendment. The Court said at Page 463 of the opinion:

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."
>
> * * *
>
> "It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employes and exclude stock companies from the same privilege. If there were any such basis, it would have been discovered by the state courts. The trial court said there was none. Two Justices of the Supreme Court were of the same opinion. The prevailing opinion in that court fails to disclose any good reason for the discrimination. The diligence of counsel for appellee has not been more successful. Thus the efforts in the state courts, and here, to find support for the statute have conspicuously failed."

The absence of facts to justify the discrimination is as apparent in the instant case as in the above decisions. There is nothing to indicate that an evil existed or might arise to make the Statute necessary or desirable. There is no evidence in the record that even remotely shows the relationship between the Statute and public health, morals, safety or general welfare.

The Statute is not a revenue measure. It does not impose any license requirements, nor is it an inspection Statute.

Nothing therein contained has anything to do with the character or quality of the liquor imported into the State. No distinction is made between deleterious and pure products. They may contain 25% of alcohol by volume or any greater quantity without limit. No assurances of safety from their use are afforded. The branded bottle is fraught with good or evil, to the same extent as one without a label. If a question of morals is involved, it arises from the use of the liquor rather than from the container or the brand it wears.

It cannot be claimed that the Statute is designed to prevent monopoly. On the contrary, monopoly is bound to result from its enforcement. The owner of the registered brand is given the exclusive right to import. The resident-manufacturer is given a monopoly of the brands which cannot be registered. As before pointed out, he may appropriate the brands of others without being answerable in law or equity.

III.

CONCLUSION.

The Twenty-first Amendment did not remove the restrictions imposed by the Fourteenth Amendment upon the police power of the States.

The Statute here challenged denies to the appellee the equal protection of the laws and is null and void.

That the decree of the lower Court should be affirmed is respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 761.

WILLIAM MAHONEY, as Liquor Control Commissioner of the State of Minnesota, et al.,

Appellants,

v.

JOSEPH TRINER CORPORATION,

Appellee.

BRIEF OF THE STATE OF INDIANA AS AMICUS CURIAE.

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BRIEF OF THE STATE OF INDIANA AS AMICUS CURIAE.

Omer S. Jackson, Attorney-General of Indiana, for and on behalf of the State of Indiana, as amicus curiae herein, submits to the Court the following considerations relative to the constitutional questions involved in this case:

I.

The Interest of the State of Indiana in the Legal Doctrines Which May Be Enunciated by the Court in Deciding the Pending Cause.

The instant case involves the validity of Chapter 390 of the Laws of Minnesota, which provides:

> "No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors con-

taining more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the Patent Office of the United States."

The statutory three-judge court from whose decision this appeal has been taken by the State Liquor Control Commissioner of the State of Minnesota held that such statute has no reasonable relation to the regulation or control of the liquor traffic within the State of Minnesota; that the Twenty-first Amendment to the United States Constitution has not freed the states from all restrictions upon their police power which are to be found in such Constitution; that such statute violates the equal protection clause, and that it is therefore invalid.

While the State of Indiana does not have any enactment similar to the Minnesota statute here involved, nevertheless, since the validity of such statute hinges upon the interpretation to be given to the second section of the Twenty-first Amendment, the State of Indiana is gravely concerned therein because of certain retaliatory liquor legislation which has been passed by the States of Michigan and Missouri directly affecting exports of beer manufactured in Indiana into such states. By way of explanation, the State of Indiana in 1935 enacted a law requiring licensed wholesalers of Indiana desiring to also engage in the importation of beer into such state from other states to obtain a "port of entry" license from the State of Indiana at a cost of $1,500.00 per year, and limiting the number of such port of entry licenses to one hundred. The States of Michigan and Missouri, feeling that laws of this character might have a harmful effect on the export business which their respective manufacturers of beer might otherwise be able to establish in the State of Indiana and

certain other states having laws of similar character, enacted certain retaliatory statutes to prohibit the distribution, possession or sale of any beer manufactured in the State of Indiana or in such other states having similar statutory provisions. A more detailed statement of the provisions of the Michigan and Missouri statutes will be found in paragraph IV and Exhibit A of this brief. The validity of both of these statutes is involved in pending litigation which will shortly come before this tribunal.

While the State of Indiana fully realizes that the validity of the Michigan and Missouri statutes is not, and cannot, be involved in this appeal, nevertheless it confidently believes that this Court may welcome its views as amicus curiae in the instant case, in order that the Court may be thereby assisted in understanding more clearly and from all angles the situation as a whole, as well as the perplexing questions which are confronting not only the State of Indiana, but its various sister states in their control of the liquor traffic and their relations with each other.

Consequently, while the factual situation under the Minnesota statute and that obtaining under the Michigan and Missouri statutes have little, if anything, in common, a determination of the extent to which the provisions of the Twenty-first Amendment free a state from the operation of the Commerce Clause and the Fourteenth Amendment is pertinent in considering the validity of both types of legislation.

II.

The Purpose of the Brief of Amicus Curiae.

The enactment of these statutes in the States of Michigan and Missouri, if proper under the Twenty-First Amendment, has created a serious question of policy for the State of Indiana. It must either see its breweries lose

large markets for their products within such states, or it must surrender its sovereign power as a state and suffer itself to be coerced into repealing certain purely police regulations which have heretofore been found successful in minimizing certain evils of the liquor traffic within its borders. Therefore, the State of Indiana desires to ascertain, before the time arrives for it to make alterations in its laws at the regular session of the next General Assembly, which convenes early in January, 1939, whether such retaliatory type of laws is constitutional under the Commerce Clause and the Fourteenth Amendment considered in connection with the second section of the Twenty-first Amendment. These precise questions, your amicus curiae is advised, will be presented in the near future to this Court in cases arising under both the Michigan and Missouri statutes.

III.

Cases Which Have Arisen Under the Michigan and Missouri Acts.

Indianapolis Brewing Co., Inc., Plaintiff, v. The Liquor Control Commission of the State of Michigan et al., in equity, No. 8259, U. S. District Court, Eastern District of Michigan, Southern Division (three judges), 21 Fed. Supp. 969 (current advance sheets March 21).

Joseph Finch & Co. v. Roy McKittrick et al., In Equity, No. 668 (not reported).

IV.

Statutory Provisions of Michigan and Missouri Which Are Involved.

Section 40 of Act No. 8 of the Public Acts of the State of Michigan, Extra Session 1933, as amended by Act No. 281 of the Public Acts of Michigan, regular session 1937.

Section 4, Laws of Missouri 1937, p. 536.

For the convenience of the Court the pertinent provisions of the Missouri law are set out in Appendix A.

The pertinent provisions of the Michigan Act being fewer in number, although of the same general nature as the Missouri Act, are now substantially set out.

Amended Section 40 of the Michigan Act cited above provides:

> "The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective ninety days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state."

The foregoing provisions of amended section 40 disclose that Michigan has prescribed four so-called grounds for exclusion, and that the importation, possession and sale within Michigan, of beer produced in any sister state, depends entirely upon whether any of the laws or regulations of the latter state fall within one or more of such four classifications, regardless of whether the offending provisions are found necessary by such state for the proper control of the traffic within its borders.

On December 14, 1937, the Liquor Control Commission of Michigan adopted a regulation designating the State of Indiana as having in full force and effect a statute containing some or all of the obnoxious provisions. Subsequently the Liquor Control Commission of that state deferred the effective date of the regulation until the early part of the year 1939. It is the validity of this regulation and of amended section 40 that is involved in the case of Indianapolis Brewing Co., Inc., plaintiff, v. The Liquor Control Commission of the State of Michigan et al., referred to in paragraph III of this brief.

V.

The Bearing of the Present Case Upon the Problems Presently Arising for the Consideration of This Court Under the Retaliatory Type of Statute.

Should the present case be decided upon the ground that the provisions of the Minnesota statute involved in this appeal have a reasonable relation to the control of the liquor traffic within the State of Minnesota, such decision would imply that the dispensation accorded by the Twenty-first Amendment to the states from the operation of the Commerce Clause and the Fourteenth Amendment does not avail where the state statute involved has no reason-

able relation to the control of the liquor traffic within its borders or is not reasonably adapted to achieve such purpose. In other words, such holding would be within the decision of the Court in the Young's Market Case which upheld the statute of the State of California imposing a different license fee upon wholesalers importing foreign beer than was imposed upon the wholesalers of domestic beer because there was a reasonable ground for differentiation. The latter holding also implied that the Twenty-first Amendment was coextensive in its operation with the purpose which brought this amendment into being, namely, to enable the state properly to regulate or prohibit the alcoholic traffic to the extent required for police purposes, without being hampered in so doing by the Commerce Clause.

Likewise, if the Court should decide that there was no such reasonable relation between this legislation of Minnesota and the control or policing of the liquor traffic therein and that the same must therefore fall, this Court would be recognizing the same principle of construction of the Twenty-first Amendment.

However, if this Court were to construe the Twenty-first Amendment as upholding any species of state legislation, enacted with due formalities, however unrelated to the accomplishment of the suppression of the evils of the alcoholic traffic within its borders, the effect of such a holding would be to supply constitutional warrant for the retaliatory type of legislation such as has been enacted in Michigan and Missouri.

VI.

The Retaliatory Type of Legislation as a Serious Threat to the Integrity of the Twenty-first Amendment Itself.

Of course, before the enactment of the Wilson Act and the Webb-Kenyon Act, the Fourteenth Amendment and the Commerce Clause of the Constitution enabled the out-of-state dealers in alcoholic liquors under the protection of these constitutional provisions to ship goods into a prohibition state and thus break down the domestic policy of a state in its efforts to control the alcoholic traffic within its borders. Leisy v. Harden, 135 U. S. 100, 109 (1889). The classic purpose of the Webb-Kenyon Act, as stated by Chief Justice White in Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 324 (1917), was "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws and thus, in effect, afford a means of subterfuge and indirection to set such laws at naught."

It has commonly been accepted that the Twenty-first Amendment, following closely the language of the Webb-Kenyon Act, was intended to incorporate the policy of the Webb-Kenyon Act into the Constitution. In fact, such was expressly declared to be its purpose in the congressional discussion occurring during the formulation of the amendment. Senator Borah, speaking of conditions arising from the inability of the states to exercise their police powers upon interstate commerce, in his discussion of this amendment on the floor of the Senate (Vol. 76, Congressional Record, page 4172), said:

"All this was sought to be remedied by the Webb-

> Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the states of incorporating it permanently in the Constitution of the United States."

However, the so-called retaliatory laws, such as are instanced in this brief as having been enacted in the States of Michigan and Missouri, do not have the same purpose or object as the state laws which the Webb-Kenyon Act was enacted to support. For instance, the opinion of the three-judge District Court in Indianapolis Brewing Co., Inc., v. the Liquor Control Commission of the State of Michigan, 21 Fed. Supp. 969, does not profess to hold that amended Section 40 of the Michigan Act No. 8 (A. D. 1937), containing the so-called standards of exclusion based upon the provisions of the Indiana laws, has, as its object, the policing of the alcoholic traffic within the State of Michigan, although police powers, from their very nature, must be restricted in their operation to the territorial jurisdiction of the state exercising them.

On the contrary, this opinion of the three-judge District Court bottoms the validity of the Michigan statute upon the power of the State of Michigan to enact legislation designed for one purpose only, namely, to promote the sale and distribution of beer made in Michigan throughout the other states of the Union by constraining the Legislatures of such states to remove any police regulations of such states which apply different methods of treatment of foreign beer as compared to domestic beer, and holds that since such legislation would tend to promote the development of the beer industry within the State of Michigan, it is related to the promotion of the prosperity of the people of Michigan and therefore within the police power of a state and, consequently, within the

protection accorded to its laws under the Twenty-first Amendment as against the operation of the Commerce Clause and the Fourteenth Amendment. The view of the Twenty-first Amendment which is implied in this holding of the three-judge court in Michigan contemplates that the dispensation accorded by the amendment to the several states may be employed to promote the growth and development of the alcoholic industry within such states by extending the market for their alcoholic industries throughout the whole United States. Under this view the amendment becomes not a shield, designed to protect a state from interference in the administration of its domestic policy, but a sword to advance the commercial interests of the liquor industry domiciled within the state.

But this view belies the object of the Webb-Kenyon Act and of the second section of the Twenty-first Amendment, which incorporated the policy of the Webb-Kenyon Act in the Constitution of the United States. That which is not within the policy of the Twenty-first Amendment can scarcely be regarded as within its terms. The second section of the Twenty-first Amendment attempted to perpetuate the advantages of the Webb-Kenyon Act. The Webb-Kenyon Act was enacted in a period of increasing restraint and regulation of the liquor traffic and it would be an anachronism to represent that statute as being intended to enable a state to promote the growth and development of the business of its manufacturers of alcohol throughout the other states of the country. These retaliatory laws, in fact, are diametrically opposed to the *raison d'etre* of the Twenty-first Amendment. This is patently revealed by the published propaganda of the supporters of the retaliatory type of legislation. We quote from an article in Brewery Age (Feb. Number, 1938, p. 8):

"States which have discriminatory laws then will

> have but two alternatives; either to remove all discriminations or to have highly important outstate markets closed to them. They will, we are confident, take the former course, with the net result that ultimately beer will enjoy the same freedom in interstate commerce afforded to all other legitimate articles of commerce, a status that is to be highly desired for the good of the brewing industry as a whole."

The purpose of the Webb-Kenyon Act and of the second section of the Twenty-first Amendment was not "that ultimately beer will enjoy the same freedom in interstate commerce afforded all other legitimate articles of commerce." On the contrary, the purpose of this provision of the Twenty-first Amendment was to prevent beer from flowing freely in interstate commerce to the extent that proper police legislation of the several states might under the protection of the amendment interfere therewith.

Can an interpretation of the second section of the Twenty-first Amendment be regarded as sound which will lead to the defeat of the purpose of the amendment?

VII.

Considerations Affecting the Construction of the Twenty-first Amendment.

Those who urge the view that the Twenty-first Amendment supports economic barriers, designed through retaliation to promote the sale of the beer manufactured in the enacting state throughout the other states of the Union base their position upon a literal construction of the second section of the Twenty-first Amendment and upon certain general language in Board of Equalization v. Young's Market Co., 299 U. S. 59.

A merely literal interpretation of a constitutional provision has been many times refused by this Court.

In Bain Peanut Co. v. Pinson, 282 U. S. 499, 501 (75 Law. ed. 482, 491 [1930], Mr. Justice Holmes, speaking for the majority of the Court, said:

> "The interpretation of constitutional principles must not be too literal."

He also said, speaking for a majority of the Court, in Gompers v. United States, 233 U. S. 604, 609 (58 Law. ed. 1115, 1120 [1913]):

> "But the provisions of the constitution are not mathematical formulas having their essence in form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words in a dictionary, but by considering their origin and the line of their growth."

In United States v. Lefkowitz, 285 U. S. 452, 467 (76 Law. ed. 877, 883 [1913]), Mr. Justice Butler, speaking for a majority of the Court, said:

> "And this Court has always construed the provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."

In Eisner v. Macomber, 252 U. S. 189, 205, 206 (1919), this Court had occasion to construe the Sixteenth Amendment of the Constitution authorizing a federal income tax from the standpoint of the taxability of a stock dividend; and in that connection to consider the bearing upon the new amendment of certain pre-existing provisions in the

Constitution requiring apportionment according to population for direct taxes upon real or personal property. The Court there said:

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal."

The more recent case of Evans v. Gore, 254 U. S. 245, 259 (1920), is a clear instance of the discriminating construction applied by this Court to the new amendment from the standpoint of its relation to pre-existing provisions of the Constitution, and Mr. Justice Van Devanter, speaking for the Court, said:

> "Preliminarily we observe that, unless there be some real conflict between the Sixteenth Amendment and the prohibition in Article III, Sec. 1, making the compensation of the judges undiminishable, effect must be given to the latter as well as to the former; and also that a purpose to depart from or imperil a constitutional principle so widely esteemed and so vital to our system of government as the independence of the judiciary is not lightly to be assumed."

In Marbury v. Madison, 1 Cranch. 137 (2 Law. ed. 60); this Court declared:

> "A construction which raises a conflict between parts of the constitution is inadmissible when by any reasonable interpretation they may be made to harmonize."

In Fiske v. State of Missouri (1933), 62 Fed. (2d) 150, 154 (C. C. A. 8th), the Court said:

> "The Amendment does not stand alone, and no construction of its meaning based upon such hypothesis can be sound. It is only a part of the Constitution, and must be construed as such. Like all instruments, the Constitution is subject to the rational rule of construction that the parts must be understood in relation to each other and to the entirety in order to preserve the fullest vitality of the whole instrument in all of its parts. 'It cannot be presumed that any clause in the Constitution is intended to be without effect * * * unless the words require it.' Marbury v. Madison, 1 Cranch. 137, 174, 2 L. Ed. 60; Prout v. Starr, 188 U. S. 537, 543, 23 S. Ct. 398, 47 L. Ed. 584. Therefore, when some particular clause, in its bare wording, seems to destroy or limit or qualify some other clause, it is the office of the Court to examine the involved parts in the light of the entire instrument with a view to preserving such extent of each as can harmoniously live together. Such rule has been applied to this Amendment."

In re Opinion of the Justices (Mass. 1933), 197 N. E. 99, the Court said:

> "Articles 48 and 64 of the Amendments are equally parts of the Constitution. They stand on the same footing. They are to be construed and interpreted in combination with each other and all other parts of the Constitution as forming a single harmonious instrument for the government of the Commonwealth. Tax Commissioner v. Putnam, 227 Mass. 522, 524, 116 N. E. 904, L. R. A. 1917 F, 806; Opinion of the Justices (Mass.), 196 N. E. 260."

Taking into consideration that the patent object of re-

taliatory legislation is to constrain a sister state to forego a part of its constitutional liberty to enact purely police regulations, incidentally discriminating against the products of a foreign state, though not of a retaliatory type, in order to avoid the loss of the foreign markets of beer produced within the state, it is well to view the second section of the Twenty-first Amendment from the standpoint of its effect upon the relationship between the sovereign states constituting the Union. In this connection the following language becomes pertinent:

> "To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the republic was organized. When that equality disappears we may remain a free people, but the union will not be the union of the Constitution."
>
> Coyle v. Smith, 221 U. S. 559, 567, 580 (55 L. Ed. 853, 858, 863) (1910).

Undoubtedly the Commerce Clause was intended to prevent retaliation by one state against the products of another moving in interstate commerce. This clause, of course, was adopted not only to secure the freedom of interstate commerce, but to preserve harmonious relations among the states. The second section of the Twenty-first Amendment was undoubtedly enacted, as indicated above, to enable a state to preserve its jurisdiction intact in respect to the regulation or the prohibition of liquor traffic within its borders. The objects of both these constitutional provisions are still public desiderata. The people of the United States are entitled to enjoy the benefits of both of these constitutional provisions. These provisions are susceptible of harmonious construction. Any apparent conflict may be reconciled so as to carry out all

of these objects. They may be reconciled along the lines of a formula which on the one hand will uphold the policing regulations of a state, though incidentally discriminating against the alcoholic products of other states, provided always the true object of such regulations reasonably appertains to the control of the traffic, but, on the other hand, will denounce legislation if the true object thereof is retaliation and not the policing of the domestic traffic.

Support is claimed for the retaliatory type of legislation on account of certain general language used by this Court in the introductory portion of its opinion in State Board of Equalization v. Young's Market Co., 299 U. S. 59, 62 (81 Law. Ed. 38, 41) (1936), where Mr. Justice Brandeis, speaking for the Court, said:

> "The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."

It is urged that a state may lay down any kind of a condition whatsoever as a prerequisite to the importation of out-of-state beer into its borders, however retaliatory such provisions may be and however unrelated to any object within the police power.

This interpretation of the Court's decision, however, seems to ignore the subsequent language and reasoning in this opinion. The Court said at page 64:

> "The plaintiffs insist that to sustain the exaction of the importer's license fee would involve a declaration that the Amendment has in respect to liquor freed the States from all restrictions upon the police power to

be found in other provisions of the Constitution. The question for decision requires no such generalization."

It appears from this language that this Court distinctly refused to hold that the Twenty-first Amendment freed the states from restrictions of the police power to be found in other provisions of the Constitution. The latter view is borne out by subsequent portions of the opinion. For the Court said on the same page:

> "Moreover the classifications in taxation made by California rests on conditions requiring different treatment. Beer sold within the State comes from two sources. The brewer of the domestic article may be required to pay a license fee for the privilege of manufacturing it; and under the California statute is obliged to pay $750 a year. Compare Brown-Foreman Co. v. Kentucky, 217 U. S. 563 (54 L. Ed. 883). The brewer of the foreign article cannot be so taxed; only the importer can be reached. He is subjected to a license fee of $500."

The Court was careful to ground the validity of the discriminating treatment of the importer of foreign beer as compared with the brewer of the domestic product upon the actualities of the situation and the necessity arising out of the situation for a different method of control. Earlier in the opinion (p. 63) the Court had spoken of the undoubted right of the State to "channelize desired importations by confining them to a single consignee." Separate channelization of the streams of imported and domestic beer is the substance of the provisions of the Indiana Law of which Michigan complains and which fall within the standards of exclusion provided in amended Section 40 of the Michigan Act. The Michigan Act in

effect declares that if Indiana avails itself of its constitutional right to channelize separately foreign and domestic beer it may do so only at the cost of retaliation against the manufacturer of Indiana beer.

A fair reading of the opinion in the Young's Market Co. case lends no support to the construction of the second section of the Twenty-first Amendment insisted upon by the authors of the Michigan and Missouri legislation, but, on the contrary, this opinion tends strongly to support the view that the Court was not intending to uphold the merely retaliatory type of legislation against foreign importations.

Conclusion.

Counsel for the State of Indiana sincerely believe that the considerations urged above will enable this Court to apprehend more clearly the present status of legislation throughout the country which will presently come before this Court for review and will enable this Court to appreciate more thoroughly and sympathetically the difficult and delicate problems confronting the several states in dealing with the ever-present problems of the liquor traffic in so far as the second section of the Twenty-first Amendment has a bearing thereon.

In closing, we suggest that it appears quite feasible to draw the line of demarcation along boundaries which will, on the one hand, leave the states perfectly free to deal with their domestic problems of liquor control without interference by other states, and, on the other hand, will not permit undue interference with interstate commerce by upholding retaliatory legislation designed to thwart

and not to secure the beneficent objects of the second section of the Twenty-first Amendment.

Respectfully submitted,

STATE OF INDIANA,

By: OMER S. JACKSON,
Attorney-General of Indiana,

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EXHIBIT A.

PERTINENT PORTIONS OF MISSOURI STATUTE.

(Section 1, Subsection 7 and Subsection 8; Section 4, Laws of Missouri 1937, p. 536.)

"(7) The phrase 'discriminatory laws' means the laws of any state, or the rules or regulations of any administrative officer, commission or body thereof, which

(a) impose any tax, impost, or license fee upon the right to transport or import into such state any alcoholic liquor manufactured in this state; or

(b) prohibit the importation, transportation, or sale of any alcoholic liquor manufactured in this State unless the manufacturer obtains a license or pays a tax or fee when such manufacturer neither imports nor transports such liquor into said state nor sells the same therein; or

(c) prohibit or restrict any licensee in said state from purchasing, or from importing or transporting into said state, alcoholic liquor for the purpose of sale at wholesale therein from any manufacturer or wholesaler in this state, if such licensee may lawfully purchase the same kind of alcoholic liquor for the purpose of resale at wholesale therein from a manufacturer in said state without such restrictions or prohibition; or

(d) impose any different warehousing requirements or higher warehousing fees or inspection fees upon any alcoholic liquor manufactured in this State and imported or transported into such state than is imposed upon the same kind of alcoholic liquor manufactured in such state; or

(e) prohibit any manufacturer or wholesaler in this State or the agents or representatives of either from exercising the privilege of soliciting orders for the sale of alcoholic liquor manufactured in this State to any licensed wholesaler in said State, if the sale is to be made outside thereof, or to any retailer if such orders are to be filled therein by or through a licensed wholesaler in said State, if licensed manufacturers or wholesalers of the same kind of alcoholic liquor in said State or the agents or representatives of either are authorized to solicit orders for the sale of such alcoholic liquor manufactured in said State to licensed wholesalers or retailers; or requires manufacturers or wholesalers in this State, or the agents or representatives of either, to secure a license or pay a fee for said privilege, if no additional license or further fee is required of licensed manufacturers or wholesalers in said State for the privilege of soliciting orders from wholesalers or retailers; or impose upon a manufacturer or wholesaler in this State, or upon the agents or representatives of either, a higher fee for the privilege of soliciting orders for the sale of alcoholic liquors manufactured in this State than is imposed upon any person therein for the sole privilege of soliciting orders for the sale of the same kind of alcoholic liquor manufactured in said state; or

(f) impose any higher fees or taxes upon alcoholic liquor manufactured in this state when imported, transported, or sold therein than is imposed upon the same kind of alcoholic liquor manufactured and sold within said state; or

(g) impose any higher fee for the privilege of selling or handling any alcoholic liquor manufactured in this state than is imposed for the privilege of handling or selling

the same kind of alcoholic liquor manufactured within said state; or

(h) impose any prohibition against or limitations, restrictions, or condition, upon the purchase, sale, or solicitation of orders for the sale of alcoholic liquor manufactured within this state, or upon any person purchasing, soliciting orders for the sale, or selling the same that is not imposed upon the same kind of alcoholic liquor manufactured within such state, or upon persons purchasing, selling, or soliciting orders for the sale of the same; or

(i) impose, directly or indirectly, any other prohibition, restrictions, or condition, upon the receipt, possession, disposition, or transportation of alcoholic liquor manufactured in this state, which is not equally imposed upon the same kind of alcoholic liquor manufactured in said state, and in such manner as to place the alcoholic liquor manufactured in this state at a disadvantage in competition therein with the same kind of alcoholic liquor manufactured in said state. Provided, however, that the phrase "discriminatory laws," as above defined, shall not be deemed to include any requirement by law, rule or regulation of any state for (1) the furnishing of a bond by an importer or person first in possession of alcoholic liquor within such state, if the bond as required does not exceed the sum of $5,000 or in any event the amount of the bond required of any licensed manufacturer of the same kind of alcoholic liquor within such state, or (2) the making of reports as to the kind and quantity of liquor received or sold by such person, or (3) the obtaining of a separate license authorizing only importation if no fee is required to be paid therefor, and if such license may be obtained by any person authorized to sell at wholesale, upon application therefor; and provided, further, that in order to

secure said importer's license it shall not be required of any corporation applying therefor that any percentage of its stockholders or directors or officers be citizens or residents of said state; or (4) the limiting of the right to import or transport into said state to those who are duly licensed to sell such liquors at wholesale."

"(8) The phrase 'state in which discrimination exists' means any state of the United States as to which the Attorney-General finds and certifies, as herein provided, that discriminatory laws exist, and so long as the certificate remains effective any state so certified by him shall be a 'state in which discrimination exists.'"

"Section 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a state in which discrimination exists is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any state in which discrimination exists as herein defined. Provided, however, that

(a) As to alcoholic liquor manufactured in any state as to which the Attorney-General certifies that discriminatory laws exist, where no appeal is taken from his finding, the prohibition of this section shall become effective forty-five (45) days after the publication of the notice provided in Section 2 hereof;

(b) As to alcoholic liquor manufactured in any state as to which the Attorney-General certifies that discriminatory laws exist and an appeal is taken from his finding, the prohibition of this section shall become effective thirty (30) days after the order or judgment of the court or judge, if such finding is affirmed."

SUPREME COURT OF THE UNITED STATES.

No. 761.—October Term, 1937.

William Mahoney, Liquor Control Commissioner, Appellant, *vs.* Joseph Triner Corporation.	On Appeal from the District Court of the United States for the District of Minnesota.

[May 23, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

Section 2 of the Twenty-first Amendment to the Federal Constitution provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The adoption of the Amendment was proclaimed December 5, 1933. In February, 1934, Joseph Triner Corporation, an Illinois corporation engaged there in the manufacture of intoxicating liquors, complied with the Minnesota foreign corporations law; secured from the Liquor Control Commissioner a license to sell such liquors within Minnesota at wholesale; and thereafter carried on in that State the business of selling to retailers liquors manufactured by it in Illinois. The Legislature of Minnesota enacted Chapter 390, approved April 29, 1935, which provides:

"No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 percent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States."

The business of Joseph Triner Corporation in Minnesota included selling many brands of liquors containing more than 25 per cent. of alcohol which had not been registered in the Patent Office; and at the time of the enactment of the statute it had there a stock of such liquors. To enjoin the Liquor Control Commissioner of Minnesota from interfering with the business, it brought this suit in the

federal court for that State; alleged that the statute of 1935 violated the equal protection clause of the Fourteenth Amendment of the Federal Constitution; alleged danger of irreparable injury; and sought both a preliminary and a permanent injunction. The several state officials charged with the duty of enforcing the statute were joined as defendants.

The case was heard by three judges under Section 266 of the Judicial Code. The court, holding that it had both federal and equity jurisdiction, granted a preliminary injunction, 11 F. Supp. 145; and later a permanent injunction, 20 F. Supp. 1019. The state officials appealed to this Court. The sole contention of Joseph Triner Corporation is that the statute violated the equal protection clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic.

First. The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. For only that locally processed may be sold regardless of whether the brand has been registered. That, under the Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 62, 63. There, it was contended that, by reason of the discrimination involved, a statute imposing a $500 license fee for importing beer violated both the commerce clause and the equal protection clause. In sustaining its validity we said:

"The words used [in the Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it [the State] prescribes. . . .

"The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed amendment. As we think the language of the Amendment is clear, we do not discuss these matters. . . .

"The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of.

A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Second. Joseph Triner Corporation insists that the statute is unconstitutional because it permits unreasonable discrimination between imported brands. That is, the registered brands of other foreign manufacturers may be imported while its unregistered brands may not be, although "identical in kind, ingredient and quality". We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market* case, p. 62, "involve not a construction of the Amendment, but a rewriting of it."

Third. The fact that Joseph Triner Corporation had, when the statute was passed, a valid license and a stock of liquors in Minnesota imported under it, is immaterial. Independently of the Twenty-first Amendment, the State had power to terminate the license. *Mugler* v. *Kansas*, 123 U. S. 623; *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 228.

Reversed.

Mr. Justice REED concurs in the result.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.